

NOTES

APPROPRIATIONS BY ANY OTHER NAME: THE ILLEGALITY AND UNCONSTITUTIONALITY OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

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INTRODUCTION	1351
I. THE HISTORY OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS	1355
A. <i>Third-Party Payments and the Early Development of SEPs</i>	1356
1. Early GAO Opinions	1357
2. Early EPA Policy	1358
3. The Coming of SEPs	1359
B. <i>The Evolution of SEP Policy</i>	1360
1. EPA's 1998 Policy	1360
2. The Development of SEP Policy	1362
3. Political Opposition to Third-Party Payments	1364
C. <i>The Trump and Biden Administrations</i>	1365
1. Implementing the Sessions Memo	1365
2. The Clark Memos	1367
3. Eliminating Third-Party Payments . . .	1369
4. . . . and Bringing Them Back	1371
II. WHAT'S WRONG WITH SEPS?	1373
A. <i>Statutory Problems</i>	1373
1. The Miscellaneous Receipts Act	1374

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2.	The Antideficiency Act	1375
B.	<i>Constitutional Problems</i>	1377
1.	The Power of the Purse	1378
2.	The Limits of the Appropriations Clause	1380
3.	Executive Discretion	1383
C.	<i>Legal Precedents</i>	1384
1.	The Courts of Appeals	1384
2.	<i>Softwood Lumber</i>	1386
III.	ENDING THIRD-PARTY PAYMENTS	1388
A.	<i>Congress: Passing the Stop Settlement Slush Funds Act</i>	1389
B.	<i>The Executive: The Role of the Administrative Procedure Act</i>	1389
C.	<i>The Judiciary: Bringing a Challenge to a Consent Decree</i>	1390
	CONCLUSION	1391

INTRODUCTION

On May 17, 2023, the U.S. Department of Justice announced—on behalf of itself and the Environmental Protection Agency—a settlement under the Clean Air Act with BP Products North America Inc. (BPP).¹ The settlement concerned BPP’s operations at its refinery in Whiting, Indiana, and the announcement promised the implementation of control technology at that plant estimated to result in a reduction of over 400 tons of various pollutants and emissions per year.² On the same day, the government simultaneously filed both a 22-page complaint *against* BPP and a 168-page consent decree *with* BPP in the Northern District of Indiana.³ The complaint detailed the government’s allegations against BPP,⁴ while the consent decree contained a variety of provisions that would be expected in light of the allegations in the complaint: a civil penalty, compliance requirements, reporting and recordkeeping requirements, stipulated penalties, and so forth.⁵ But also nestled among the terms of the consent decree was a requirement for BPP to carry out a “Supplemental Environmental Project” (SEP).⁶

This was not a hidden provision of the settlement: the government proudly announced in the press release that BPP had “agreed to undertake a \$5 million supplemental environmental project to reduce diesel emissions in the communities surrounding the Whiting Refinery.”⁷ This project would “replace existing diesel vehicles . . . with alternative fuel vehicles resulting in decreased emissions.”⁸ BPP stipulated that this project was not one which it was already required to perform (whether by law, regulation, or other preexisting obligation), nor one that it had had any prior intention to perform.⁹ This

1 Press Release, U.S. Dep’t of Just., Justice Department and EPA Announce Settlement to Reduce Hazardous Air Emissions at BP Products’ Whiting Refinery in Indiana (May 17, 2023), <https://www.justice.gov/opa/pr/justice-department-and-epa-announce-settlement-reduce-hazardous-air-emissions-bp-products> [https://perma.cc/AB7G-T2A5].

2 *Id.* (claiming a reduction in benzene emissions of 7 tons per year, in other hazardous air pollutant emissions of 28 tons per year, and in other volatile organic compound emissions of 372 tons per year).

3 *Id.*; Complaint, United States v. BP Prods. N. Am. Inc., No. 23-cv-166 (N.D. Ind. May 17, 2023); Consent Decree, *BP Prods.*, No. 23-cv-166.

4 See Complaint, *supra* note 3, at 12–19; *cf.* Press Release, *supra* note 1 (explaining the allegations in the complaint).

5 See Consent Decree, *supra* note 3, at 17–19 (civil penalty), 19–56 (compliance), 59–63 (reporting and recordkeeping), 63–74 (stipulated penalties).

6 *Id.* at 56–59, app. E. The term “SEP” is pronounced as a word rhyming with *pep*.

7 Press Release, *supra* note 1.

8 Consent Decree, *supra* note 3, app. E at 1–2 (referring to vehicles “within the local government itself” or “owned and used by non-profits within each community”).

9 *Id.* at 57.

stipulation raises the question of whether this project was appropriate matter for a settlement decree, whether it was the kind of relief that the government could have obtained by litigating its complaint against BPP to final judgment. BPP further stipulated that it “would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction SEP, if EPA were precluded by law from accepting a diesel emission [sic] reduction SEP.”¹⁰

What light, if any, did these stipulations shed on the government’s claim that BPP had “*separately* agreed to undertake [this] \$5 million supplemental environmental project”?¹¹ Given the stipulation that BPP would perform some other “comparably valued” SEP should some problem arise with the specified one, it appears rather that the government saw BPP’s expenditure of at least \$5 million on *some* kind of supplemental environmental project to be a vital part of the deal between them. In other words, the government saw the \$5 million SEP as an integral part of its calculation of the value of the claims it was settling against BPP.

But what’s really at stake here? Consent decrees are tools which the government commonly uses in enforcement actions in a wide variety of public law contexts, including environmental law.¹² They differ from private settlement agreements in several key ways. Most fundamentally: “A consent decree is simply a settlement that includes an injunction.”¹³ This injunction serves to *enforce* the terms of the settlement, so a consent decree can also be described as “a settlement that is backed by the contempt power of the courts and amenable to

10 *Id.* The stipulation is required by statute. 42 U.S.C. § 16139 (2018) (“In any settlement agreement regarding alleged violations of environmental law in which a defendant agrees to perform a diesel emissions reduction Supplemental Environmental Project, the Administrator of the Environmental Protection Agency shall require the defendant to include in the settlement documents a certification under penalty of law that the defendant would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction Supplemental Environmental Project if the Administrator were precluded by law from accepting a diesel emission [sic] reduction Supplemental Environmental Project.”); *see also* Memorandum from Walker B. Smith, Dir., Off. of Civ. Enf’t, U.S. Env’t Prot. Agency, to Reg’l Couns., Reg’l Enf’t Coordinators, Reg’l Enf’t Div. Dirs. & OECA Off. Dirs. 1 (July 18, 2008) [hereinafter Smith Memorandum], <https://www.epa.gov/sites/default/files/2018-10/documents/dieseplegslegislation-memotoregions.pdf> [https://perma.cc/L8LS-6MUQ] (requiring “all administrative and judicial settlements not concluded as of the date of this memorandum that include diesel SEPs” to include the specified language).

11 Press Release, *supra* note 1 (emphasis added).

12 Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 321 (1988).

13 Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 103.

modification by court order even over objections of the parties.”¹⁴ Practically, while the terms of a private settlement agreement “can be kept secret by the parties” and are not policed by the presiding judge *at all*, the terms of a consent decree are “generally available to any interested party,” and the judge entering the decree has an obligation to “determine that [it] is fair and consistent with the public interest.”¹⁵ The use of consent decrees in regulatory enforcement in general has been subject to criticism,¹⁶ but SEPs provide a more specific target, which critics have homed in on for decades.

The SEP in the Whiting refinery consent decree represented an attempt by the government to set up a diesel emissions reduction SEP as authorized by federal law.¹⁷ The relevant statute, however, requires that such a SEP be “related to the underlying alleged violations,”¹⁸ and it’s not clear how replacing vehicles with diesel engines owned by local governments or nonprofits in the general vicinity of the refinery is “related” to emissions violations at the refinery. Of course, BPP already

14 Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENV’T L. REV. 191, 200 (2015).

15 *Id.*; cf. C. Boyden Gray & Michael Buschbacher, *In the Name of ‘Environmental Justice,’ DOJ Betrays the Public Trust*, NEWSWEEK (May 13, 2022, 7:00 AM EDT), <https://www.newsweek.com/name-environmental-justice-doj-betrays-public-trust-opinion-1705802> [<https://perma.cc/FKW8-R8YS>] (“Judges typically don’t scrutinize settlement agreements, and courts are skeptical of direct attacks on government enforcement policies.”). Those who defend SEPs often seem to make no distinction between consent decrees and private settlement agreements, arguing as if anything the parties agree to should be accepted in a consent decree, but the Tenth Circuit has ruled otherwise:

Put briefly, a settlement agreement or consent decree designed to enforce statutory directives is not merely a private contract. It implicates the courts, and it is the statute—and “only incidentally the parties”—to which the courts owe their allegiance. The primary function of a settlement agreement or consent decree, like that of a litigated judgment, is to enforce the congressional will as reflected in the statute. The court should modify or refuse to enforce a settlement agreement or proposed decree unless it is “in furtherance of statutory objectives.” The agreement or consent decree is contractual only to the extent that it represents an agreement by the parties regarding the most efficient means of effectuating *their rights under the statute*.

Biodiversity Assocs. v. Cables, 357 F.3d 1152, 1169 (10th Cir. 2004) (emphasis added) (quoting *Sys. Fed’n No. 91 v. Wright*, 364 U.S. 642, 651 (1961)); cf. The Federalist Society, *The Return of Supplemental Environmental Projects*, YOUTUBE at 5:03 (June 21, 2022) [hereinafter *Return of SEPs*], <https://youtu.be/YkZoaXBTX-o> [<https://perma.cc/7DPV-CKW6>] (“SEPs are by definition not a form of relief that any court can enter if the case is litigated to judgment . . .”). Applied to SEPs, the Tenth Circuit’s approach would practically wipe them out since they are, in an important sense, always beyond the relevant statutory objectives.

16 See, e.g., *Kramer*, *supra* note 12; McVean & Pidot, *supra* note 14.

17 42 U.S.C. § 16138 (2018) (authorizing the EPA Administrator to accept “diesel emissions reduction Supplemental Environmental Projects . . . as part of a settlement of any alleged violations of environmental law”).

18 *Id.* § 16138(2).

stipulated that it would perform some other SEP if the diesel emissions reduction SEP turned out to be precluded by law.¹⁹ But there are no other provisions of federal law which authorize the government to accept SEPs of any kind as part of any settlement,²⁰ which raises the question of what other SEP the Department of Justice thought it might be able to accept. Does the government *require* statutory authorization to accept a SEP in a settlement agreement?

Generally speaking, SEPs are authorized by the *policy* of the Department of Justice and the Environmental Protection Agency. According to EPA, a SEP is “an environmentally beneficial project or activity that is not required by law, but that [an alleged violator] agrees to undertake as part of the settlement of an enforcement action.”²¹ In other words, a SEP involves the execution of some environmentally beneficial program in exchange for a reduction in penalties, but inasmuch as SEPs also involve “payments to various non-governmental, third-party organizations as a condition of settlement with the United States,” they are also a form of third-party payment.²² DOJ and EPA have been approving SEPs in one form or another for at least the past forty years, but SEPs have come under criticism over the course of the past four decades for violating both the Constitution and federal law.²³ Under President Trump, DOJ phased out all third-party payments (including SEPs) in settlement agreements because of such concerns about their legality, laying out the argument against them in a series of memoranda which ultimately culminated in an amendment to the

19 Consent Decree, *supra* note 3, at 57.

20 Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen. (ENRD), Env’t & Nat. Res. Div., U.S. Dep’t of Just., to ENRD Deputy Assistant Att’y Gen. & Section Chiefs 5 (Jan. 13, 2021) [hereinafter 2021 Clark Memorandum], https://www.justice.gov/d9/2023-06/memo_re_28_c.f.r._s_50.28_public_version_1.13.2021.pdf [<https://perma.cc/86LZ-Y7DL>]. But for an interpretation of federal law finding a *second* instance of something which could be described as a SEP being authorized, see *infra* note 83.

21 U.S. ENVT’L PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE, at 1 (2015) [hereinafter 2015 POLICY]; *accord* U.S. ENVT’L PROT. AGENCY, EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY, at 4 (1998) [hereinafter 1998 POLICY].

22 Memorandum from the Att’y Gen. to All Component Heads & U.S. Att’y (June 5, 2017) [hereinafter Sessions Memorandum], <https://www.justice.gov/opa/press-release/file/971826/dl> [<https://perma.cc/Z3DK-93JW>]; see Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen., Env’t & Nat. Res. Div., U.S. Dep’t of Just., to ENRD Deputy Assistant Att’y Gens. & Section Chiefs 1–2 (Mar. 12, 2020) [hereinafter 2020 Clark Memorandum], https://www.justice.gov/d9/2023-06/seps_public_final_signed_3.13.20.pdf [<https://perma.cc/Z2R2-HP5G>].

23 Not content with their statutory power to enforce federal environmental law by bringing suit against alleged violators, DOJ and EPA seem to insist on exercising an ability to direct how funds involved in such suits should be spent. Their position is reminiscent of Shakespeare’s petulant King Richard II: “We were not born to *sue*, but to *command*” WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc. 1, l. 196 (Anthony B. Dawson & Paul Yachnin eds., 2011) (emphasis added).

relevant section of the *Code of Federal Regulations*.²⁴ But the Biden administration promptly reversed those actions and reapproved SEPs (and third-party payments more generally) for use in settlements, albeit without addressing the arguments made in the previous memoranda.²⁵

This Note fleshes out the history of SEPs and the recent arguments against them. First, Part I traces the history of SEPs, from the early use of third-party payments, through the development of formal policies governing SEPs, to the Trump and Biden administrations' dueling approaches to them. Then Part II explains what's wrong with SEPs. Expanding on the arguments made in the various Justice Department memoranda, this Note argues that SEPs contravene both the Miscellaneous Receipts Act (MRA)²⁶ and the Antideficiency Act (ADA).²⁷ Next, the Note argues that while their illegality might be remedied by statute, SEPs also present deeper—and ultimately insuperable—constitutional issues because of how they violate the Constitution's grant of the appropriations power exclusively to Congress. Moreover, the legal precedents which are often invoked in favor of SEPs do not offer enough support to justify their use. As a result, the practice of including SEPs in consent decrees should be permanently ended. Finally, Part III considers how each branch of government might contribute to bringing about an end to SEPs and suggests that a legal challenge to a consent decree containing a SEP offers the best prospect for a stable resolution of the issue.

I. THE HISTORY OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Supplemental environmental projects (and third-party payments in settlement agreements more generally) have been controversial for decades. Although it's not entirely clear, EPA seems to have begun including SEP-like provisions in settlement agreements around 1980.²⁸

24 See 28 C.F.R. § 50.28 (2021).

25 Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, 87 Fed. Reg. 27936 (May 10, 2022) [hereinafter Rule Repeal].

26 31 U.S.C. § 3302 (2018). The original version of the Miscellaneous Receipts Act was passed in 1849. Act of Mar. 3, 1849, ch. 110, 9 Stat. 398; see *Protecting Congress's Power of the Purse and the Rule of Law: Hearing Before the H. Budget Comm.*, 116th Cong. 5 & n.26 (2020) (testimony of Josh Chafetz) [hereinafter Chafetz Testimony].

27 31 U.S.C. § 1341 (2018 & Supp. III 2022). The original version of the Antideficiency Act was passed in 1870. Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251; see Chafetz Testimony, *supra* note 26, at 5 & n.27.

28 2020 Clark Memorandum, *supra* note 22, at 6 ("EPA has been including SEP-like provisions in settlement agreements since about 1980."); Letter to John D. Dingell, Chairman, Subcomm. on Oversight & Investigations, H. Comm. on Energy & Com., B-247155, 1992 WL 726317, at *1 (Comp. Gen. July 7, 1992) [hereinafter 1992 GAO Letter] (noting

Following a number of precursors throughout the 1980s, EPA issued its first explicit policy on SEPs in 1991.²⁹ In response to criticism in the early 1990s, EPA worked to develop a more carefully calibrated policy promulgated in 1998.³⁰ EPA continued to refine this policy in light of both criticism and congressional action, leading eventually to a fully updated policy released in 2015.³¹ Meanwhile, DOJ guidance during George W. Bush's administration "had started imposing limits on settlement payments to nonvictims," but the "Obama administration reversed course."³² The Stop Settlement Slush Funds Act of 2017 would have eliminated such payments but was not enacted.³³ Nevertheless, the Trump Department of Justice managed to implement a policy to end third-party payments, although the Biden administration promptly restored them.³⁴ SEPs have thus gone from in favor to out of favor and back again over the last several presidential administrations, and the pattern seems in danger of repeating.

A. *Third-Party Payments and the Early Development of SEPs*

The first example of a provision in a settlement agreement which seems to fit the current understanding of SEPs came in a case involving Steuart Transportation in the late 1970s.³⁵ The United States and the Commonwealth of Virginia had sued Steuart Transportation for allegedly causing an oil spill in the Chesapeake Bay, seeking damages (for the death of migratory waterfowl), statutory penalties, and cleanup costs.³⁶ The proposed settlement provided that the damages (an entitlement shared by the federal and state governments) "would be donated by Steuart to a waterfowl preservation organization to be designated jointly by the State [sic] of Virginia and the U.S. Department of

that EPA had "developed an 'alternative payment' policy with respect to the fuels provisions of the [Clean Air] Act" in 1980).

29 U.S. ENV'T'L PROT. AGENCY, OSWER 9832.20-1A, POLICY ON THE USE OF SUPPLEMENTAL ENFORCEMENT PROJECTS IN EPA SETTLEMENTS, 1991 WL 11255441 (Feb. 12, 1991) [hereinafter 1991 POLICY]. While "Supplemental *Enforcement* Projects" appears in the title, the text of the document consistently (and exclusively) refers to "Supplemental *Environmental* Projects."

30 See 1998 POLICY, *supra* note 21.

31 See 2015 POLICY, *supra* note 21.

32 163 CONG. REC. 16362 (2017) (statement of Rep. Bob Goodlatte).

33 It did pass the House. See *H.R. 732 — 115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/732> [<https://perma.cc/Z3F5-WJ5M>] (providing a history of the bill).

34 See *supra* notes 24–25 and accompanying text.

35 See *In re Steuart Transp. Co.*, 435 F. Supp. 798 (E.D. Va. 1977), *aff'd sub nom. Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979).

36 Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 685 (1980) [hereinafter *Steuart Transportation*].

the Interior.”³⁷ This provision would qualify as a “supplemental environmental project” under later EPA policy.³⁸ The Associate Attorney General asked the Office of Legal Counsel (OLC) whether this provision of the proposed settlement was barred by the predecessor version of the Miscellaneous Receipts Act.³⁹ OLC concluded that it was in fact barred, but that the statutory problem could be overcome by having the settlement attribute all of the damages related to the death of migratory waterfowl to the government’s coplaintiff, the Commonwealth of Virginia, and having these damages be “received and directed to a charity by the state plaintiff.”⁴⁰

1. Early GAO Opinions

Several years later, the Government Accountability Office (GAO) was presented with a very similar question regarding the use of third-party payments in agreements to settle enforcement actions. The Commodity Futures Trading Commission (CFTC) had proposed a new policy for the settling of enforcement actions brought under the Commodity Exchange Act which would allow the Commission “to accept a charged party’s promise to make a donation to an educational institution as all or part of a settlement agreement.”⁴¹ The CFTC claimed that such a donation would “aid in the accomplishment of one of the Commission’s statutory functions: to ‘establish and maintain research and information programs to . . . assist in the development of educational and other informational materials regarding futures trading’”⁴² But GAO found that this proposal violated the Miscellaneous Receipts Act (by that time codified at 31 U.S.C. § 3302) and concluded that the Commission lacked “authority to achieve its educational and information assistance function through the use of settlement agreements exacted from the exercise of its prosecutorial authority.”⁴³

37 *Id.* (internal quotation marks omitted).

38 2015 POLICY, *supra* note 21, at 6 (“Supplemental environmental projects are defined as environmentally beneficial projects which a defendant agrees to undertake in settlement of an enforcement action, but which the defendant, or any other third party, is not otherwise legally required to perform.” (emphasis removed)); *accord* 1998 POLICY, *supra* note 21, at 4.

39 31 U.S.C. § 484 (1976) (“The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury . . . without any abatement or deduction”).

40 *Steuart Transportation*, *supra* note 36, at 688–89, 689.

41 Commodity Futures Trading Commission—Donations Under Settlement Agreements, B-210210, 1983 WL 197623, at *1 (Comp. Gen. Sept. 14, 1983).

42 *Id.* (quoting 7 U.S.C. § 22(a) (1976)).

43 *Id.* at *2, *3.

In 1990, GAO gave its opinion on another question about third-party payments in settlement agreements, this time involving the Nuclear Regulatory Commission (NRC).⁴⁴ The Commission had “propose[d] to ‘mitigate’ civil penalties by permitting violators to fund nuclear safety research projects.”⁴⁵ GAO found this proposal essentially indistinguishable from the CFTC proposal previously disapproved in 1983 and concluded that, for similar reasons, NRC did not have authority to implement its proposal.⁴⁶

2. Early EPA Policy

In 1984, EPA issued a pair of general enforcement policies dealing with civil penalties. The first indicated that EPA would adjust an “initial penalty target figure after negotiations ha[d] begun” in order to account for “alternative payments agreed upon prior to the commencement of litigation.”⁴⁷ The second policy filled in the details regarding “adjustment of the penalty target to reflect ‘alternative payments’ the violator agrees to make in settlement of the case.”⁴⁸ This policy explained that “[i]n the past, the Agency ha[d] accepted various environmentally beneficial expenditures in settlement of a case and chosen not to pursue more severe penalties” and noted that “[m]any useful projects ha[d] been accomplished with such funds.”⁴⁹

This early EPA policy openly admitted that these “alternative payments” were being accepted *in lieu of* more severe penalties, although it limited the reduction in penalties that EPA could accept for such a project to “the after-tax amount the violator spen[t] on the project.”⁵⁰ Moreover, with a tacit nod to the Miscellaneous Receipts Act, the policy also forbade EPA from “hold[ing] any funds which are to be spent at EPA’s discretion unless the relevant statute specifically provides that authority,” apparently out of concern that actually holding the funds would constitute *receipt* of them.⁵¹ Looking ahead, the conditions which EPA placed on such alternative payments in this early policy

44 Nuclear Regulatory Commission’s Authority to Mitigate Civil Penalties, 70 Comp. Gen. 17 (1990) [hereinafter *In re NRC*].

45 *Id.* at 18.

46 *Id.* at 18–20.

47 U.S. ENVT’L PROT. AGENCY, GM-21, POLICY ON CIVIL PENALTIES 8 (1984) (capitalization altered).

48 U.S. ENVT’L PROT. AGENCY, GM-22, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA’S POLICY ON CIVIL PENALTIES 4 (1984) [hereinafter GM-22].

49 *Id.* at 24–25.

50 *Id.* at 26 & n.5 (allowing *explicitly* for a one-for-one reduction in the target penalty).

51 *Id.* at 27.

prefigured later attempts to circumscribe the use of SEPs.⁵² Alternative payments had to be for activities which were not required under existing law and which the violators would not otherwise perform.⁵³

3. The Coming of SEPs

At last, in 1991 the Environmental Protection Agency officially introduced the term “supplemental environmental projects” into its policies. EPA explicitly adopted the term as a replacement for the “alternative payments” described in its 1984 policies.⁵⁴ The new policy explained that SEPs, “if carefully crafted and executed, provide[d] useful environmental benefits beyond what c[ould] be secured solely through injunctive relief” and would be undertaken by alleged violators “in exchange for a reduction in the amount of the assessed civil penalty.”⁵⁵ The new policy described five categories of projects eligible to be approved as SEPs (as well as three types of projects previously accepted that would no longer be approved),⁵⁶ required an appropriate “nexus” between the alleged violation and the SEP,⁵⁷ and set a ceiling on the potential reduction in penalties at “the after-tax amount the violator spends on the project.”⁵⁸ EPA also recognized an important interest in ensuring that “penalties should have the strongest possible deterrent effect upon the regulated community.”⁵⁹ Contrary to previously explicit policy, a supplementary memo allowed for “a previously voluntary undertaking to [be converted into] an enforceable commitment” as a SEP in a consent agreement,⁶⁰ thus effectively allowing regulated parties to have their civil penalties reduced for something they were already doing.

Shortly after the adoption of this policy, GAO was asked for its opinion on EPA’s use of supplemental environmental projects in settling claims under the Clean Air Act. In its first pass on the question, it did not use EPA’s newly adopted language, but found, building on

52 See *infra* notes 68–71 and accompanying text.

53 GM-22, *supra* note 48, at 25.

54 1991 POLICY, *supra* note 29, at *1.

55 *Id.*

56 *Id.* at *3–5.

57 *Id.* at *5. For example, a nexus would exist when the SEP “remediates injury caused by the same pollutant at the same facility giving rise to the violation.” *Id.*

58 *Id.* at *9.

59 *Id.*

60 Memorandum from Edward E. Reich, Acting Assistant Adm’r, Off. of Enf’t, U.S. Env’tl Prot. Agency, to Reg’l Adm’rs (Regions I–X), Deputy Reg’l Adm’rs (Regions I–X), Reg’l Couns. (Regions I–X), Air Mgmt. Div. Dirs. (Regions I, III & IX) & Air & Waste Mgmt. Div. Dir. (Region II), at 2 (Nov. 1, 1991) (emphasis omitted), <https://www.epa.gov/sites/default/files/documents/sep-earlyred-rpt.pdf> [<https://perma.cc/S2FT-3ECB>].

the logic of its earlier opinions regarding CFTC and NRC policies, that EPA did not have authority to settle enforcement actions under the Clean Air Act by entering into “settlement agreements [that] allow[ed] alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them.”⁶¹ In a follow-up letter the next year, GAO made clear that it had considered the new policy on “supplemental environmental projects” and did not consider that policy to answer its own concerns about the lawfulness of such projects.⁶²

B. *The Evolution of SEP Policy*

By the mid-1990s, EPA had an approach to SEPs which understood them as a way for “violators [to] perform environmentally beneficial projects in exchange for receiving a smaller settlement penalty.”⁶³ But legal doubts about the lawfulness of SEPs—such as those raised by the GAO letters—led to EPA refining its policies surrounding them. A 1995 Interim Revised SEP Policy was followed three years later with a new final policy,⁶⁴ the *EPA Supplemental Environmental Projects Policy*.⁶⁵

1. EPA’s 1998 Policy

The 1998 policy characterized its purpose as “encourag[ing] and obtain[ing] environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy.”⁶⁶ Once again, EPA’s official policy emphasized the fungibility of SEPs in helping alleged violators reduce

61 1992 GAO Letter, *supra* note 28, at *1. GAO found that such SEPs would violate the MRA and was unpersuaded by EPA’s suggestion that the Clean Air Act authorized them. *Id.* at *3.

62 Letter to John D. Dingell, Chairman, Subcomm. on Oversight & Investigations, H. Comm. on Energy & Com., B-247155.2, 1993 WL 798227, at *1 (Comp. Gen. Mar. 1, 1993) [hereinafter 1993 GAO Letter]. The GAO letters were formally limited to the question of whether EPA could use SEPs to settle claims under section 205 of the Clean Air Act, but the development of EPA’s policy toward SEPs in the ’90s may be seen as a response to the more general concerns GAO had raised. See discussion *infra* Section I.B.

63 U.S. ENVT’L PROT. AGENCY, WSG 81, PUBLIC WATER SYSTEM SUPERVISION PROGRAM SETTLEMENT PENALTY POLICY FOR CIVIL JUDICIAL ACTIONS AND ADMINISTRATIVE COMPLAINTS FOR PENALTIES 12 (1994).

64 Memorandum from Steven A. Herman, Assistant Adm’r, Off. of Enf’t & Compliance Assurance, U.S. Emt’l Prot. Agency, to Reg’l Adm’rs 1 (Apr. 10, 1998), <https://www.epa.gov/sites/default/files/2018-10/documents/fnl-sup-hermn-memtab1.pdf> [<https://perma.cc/Q2BK-XGX8>].

65 1998 POLICY, *supra* note 21.

66 *Id.* at 1.

the value of their assessed penalties.⁶⁷ The policy defined SEPs as “environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.”⁶⁸

What was most remarkable about the 1998 policy was its section on the “Legal Guidelines” surrounding SEPs,⁶⁹ where it detailed five guidelines intended to “ensure that our SEPs are within the Agency’s and a federal court’s authority, and do not run afoul of any Constitutional or statutory requirements.”⁷⁰ Despite its professed purpose, this section did not cite a single statute or provision of the Constitution. It did not even describe any potential statutory or constitutional concerns with SEPs, let alone explain how the guidelines provided would ensure their lawfulness. Instead, it simply insisted that EPA had “broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of the settlement.”⁷¹ The policy admitted that evaluating the lawfulness of SEPs might be “a complex task,” but seemed to imply that all of that complexity could be handled by simply following its guidelines.⁷²

Beyond the legal guidelines, the new policy outlined “seven specific categories of projects which m[ight] qualify as SEPs”—as well as a few categories of projects which would not be acceptable as SEPs⁷³—and detailed a complicated framework for accounting for SEPs in the calculation of a final penalty.⁷⁴ The 1998 policy tried to move EPA away from allowing SEPs to be used for dollar-for-dollar penalty mitigation, but included two categories of exceptions where the percentage could be set as high as 100 percent provided that the project was of “outstanding quality.”⁷⁵

67 *Id.* (“All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP.”).

68 *Id.* at 4 (emphasis removed).

69 *Id.* at 5–7.

70 *Id.* at 5.

71 *Id.*

72 *Id.* The new guidelines did provide a fairly clear definition of “nexus” as “the relationship between the violation and the proposed project” which would exist if one of three conditions was true. *Id.*

73 *Id.* at 7, 7–12.

74 *Id.* at 12–17.

75 *Id.* at 16 (“The mitigation percentage should not exceed 80 percent of the SEP COST, with two exceptions . . .”). “SEP COST” refers to “[t]he net present after-tax cost of the SEP.” *Id.* at 13.

2. The Development of SEP Policy

Over the next decade, EPA issued a series of memoranda clarifying various aspects of its SEP policy. A memo two years after the 1998 policy reinforced the idea that dollar-for-dollar credit was generally inappropriate for SEPs and emphasized that “SEPs do not replace penalties.”⁷⁶ A 2002 memo “emphasize[d] the importance of nexus in evaluating proposed Supplemental Environmental Projects” and explicitly addressed, seemingly for the first time, specific concerns about the potential for SEPs to be unlawful.⁷⁷ While acknowledging that the Miscellaneous Receipts Act served “to preserve Congressional prerogatives to appropriate funds as provided for in the U.S. Constitution,” the memo claimed that the nexus requirement ensured that SEPs did not violate the MRA by granting the Agency “discretion to take the SEP into account as a mitigating factor when determining the amount of a penalty that the Agency will agree to as part of an overall settlement.”⁷⁸ The memo also addressed the concern that EPA might engage in unlawful augmentation of appropriations (in contravention of Congress’s unique appropriations authority) if it “accept[ed] any project that . . . supplement[ed], or appear[ed] to supplement, its appropriations or the appropriations of any other Federal agency,” a concern which the 1998 policy’s fifth guideline had purported to address.⁷⁹

A 2003 memo also addressed concerns about how SEPs might violate the MRA. This memo revealed that the 1998 policy had—despite its silence on the MRA—been “written carefully to ensure compliance with the MRA.”⁸⁰ Accepting advice that “the MRA prohibits EPA from managing SEP funds,” the memo insisted that the 1998 policy “makes clear that EPA cannot manage or direct SEP funds.”⁸¹ Finally,

76 Memorandum from Eric V. Schaeffer, Dir., Off. of Regul. Enf’t, U.S. Env’t Prot. Agency, to Reg’l Couns., Regions I–X; Air Div. Dirs. (Regions I–X); Water Div. Dirs. (Regions I–X); RCRA Div. Dirs. (Regions I–X) & Pesticides & Toxics Div. Dirs. (Regions I–X), at 1 (Apr. 14, 2000), <https://www.epa.gov/sites/default/files/documents/seppenmit-mem.pdf> [<https://perma.cc/QY36-8VC6>].

77 Memorandum from Walker B. Smith, Dir., Off. of Regul. Enf’t, U.S. Env’t Prot. Agency, to Reg’l Couns., Reg’l Enf’t Div. Dirs. & Reg’l Media Div. Dirs. 1, 2 (Oct. 31, 2002), <https://www.epa.gov/sites/default/files/2018-10/documents/sepnexus-memtab5.pdf> [<https://perma.cc/M2VF-92MN>].

78 *Id.* at 2.

79 *Id.*; see 1998 POLICY, *supra* note 21, at 6–7.

80 Memorandum from John Peter Suarez, Assistant Adm’r, Off. of Enf’t & Compliance Assurance, U.S. Env’t Prot. Agency, to Reg’l Couns. (Region I–X), Reg’l Enf’t Managers (Region I–X), Reg’l Media Div. Dirs. (Region I–X) & Reg’l Enf’t Coordinators (Region I–X), at 3 (Dec. 15, 2003) [hereinafter Suarez Memorandum], <https://www.epa.gov/sites/default/files/2018-10/documents/seps-thirdpartiestab11.pdf> [<https://perma.cc/2SJY-EBST>].

81 *Id.* at 3–4.

following OLC's *Steuart Transportation* opinion, EPA here explicitly acknowledged that cash payments to third parties were not acceptable because they "appear[] to violate the MRA."⁸²

In 2008, Congress passed—for the first (and only) time⁸³—legislation authorizing the inclusion of SEPs in settlement agreements.⁸⁴ This authorization was limited to SEPs designed to achieve diesel emissions reductions and required such settlement agreements to include a stipulation that the alleged violator "would have agreed to perform a comparably valued, alternative project" if EPA could not accept the diesel emissions reduction SEP.⁸⁵ EPA promptly issued a memorandum implementing the new statutory requirement.⁸⁶ But by acknowledging that explicit statutory authorization solved the potential augmentation problem posed by SEPs,⁸⁷ EPA once again legitimized the augmentation *argument* against SEPs.⁸⁸

Finally, in 2015, EPA issued a comprehensive update to its 1998 policy, "reflect[ing] and incorporat[ing] by reference all of the guidance and implementation decisions made about Supplemental Environmental Projects (SEPs) since the issuance of EPA's SEP policy in 1998."⁸⁹ The new policy's section on Legal Guidelines closely tracked the guidelines given in the 1998 policy, but expanded the fifth guideline into a detailed analysis of the problem of possible appropriations augmentation.⁹⁰ Additionally, the 2015 policy—unlike its

⁸² *Id.* at 4.

⁸³ See 2021 Clark Memorandum, *supra* note 20, at 5. But see Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, 89 Fed. Reg. 97525, 97527 (Dec. 9, 2024) [hereinafter Final Rule] (considering "42 U.S.C. 7604(g) (2), which gives courts discretion to order that penalties received under the citizens suit provision of the Clean Air Act be used to fund beneficial mitigation projects," to be another instance of SEPs being explicitly authorized by statute).

⁸⁴ Act of June 30, 2008, Pub. L. No. 110-255, 122 Stat. 2423 (2008) (codified at 42 U.S.C. §§ 16131, 16133, 16138, 16139 (2018)).

⁸⁵ 42 U.S.C. § 16139 (2018).

⁸⁶ Smith Memorandum, *supra* note 10.

⁸⁷ *Id.* at 1.

⁸⁸ But see Daniel Alvarez, Hannah Perls & Jonas Monast, *Clearing the Air on Supplemental Environmental Projects*, 54 ENV'T'L L. REP. 10382, 10393–94 (2024) (arguing that congressional authorization of diesel emissions reduction SEPs actually shows that the MRA and the ADA *do not* prohibit SEPs); Final Rule, *supra* note 83, at 97529 (arguing that "the text, context, and history of section 16138" show that Congress did not "underst[and] SEPs to violate the MRA as a general matter").

⁸⁹ Memorandum from Cynthia Giles, Assistant Adm'r, Off. of Enf't & Compliance Assurance, U.S. Env't'l Prot. Agency, to Reg'l Adm'rs 1 (Mar. 10, 2015), <https://www.epa.gov/sites/default/files/2015-04/documents/sepupdatedpolicy15.pdf> [<https://perma.cc/5PCS-V3U9>].

⁹⁰ 2015 POLICY, *supra* note 21, at 7–11; cf. 1998 POLICY, *supra* note 21, at 5–7. Another notable difference is the removal of the specific conditions required to find "nexus." Compare 2015 POLICY, *supra* note 21, at 7, with 1998 POLICY, *supra* note 21, at 5.

predecessor—explicitly acknowledged the potential for violations of the MRA, admitting that “[c]ash donations to . . . any . . . third party” are “prohibited because they may create the appearance of a diversion of penalty funds from the U.S. Treasury.”⁹¹

3. Political Opposition to Third-Party Payments

By 2017, problems with third-party payments in settlement agreements, including SEPs, had prompted a political response. Representative Bob Goodlatte introduced the “Stop Settlement Slush Funds Act of 2017” in the House of Representatives on January 30, 2017.⁹² This bill would have forbidden any

official or agent of the Government [from] enter[ing] into or enforc[ing] any settlement agreement on behalf of the United States, directing or providing for a payment or loan to any person or entity other than the United States, other than a payment or loan that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment or loan.⁹³

This provision would have covered SEPs.⁹⁴ Those who supported the bill claimed that its purpose was to ensure that proposals for such payments would have to be brought to Congress.⁹⁵ The sponsor explained that “an investigation into the Obama Justice Department’s pattern or practice of requiring settling defendants to donate money to third-party groups,” ultimately “direct[ing] nearly \$1 billion to third parties entirely outside of Congress’ spending and oversight authority,” provided the impetus for the bill.⁹⁶ According to Representative Goodlatte, “internal DOJ documents” showed that the third-party payments in Obama-era settlement agreements “were structured to aid the Obama administration’s political friends and exclude conservative groups.”⁹⁷ Exhibits were submitted into the record showing that

91 2015 POLICY, *supra* note 21, at 17 & n.25. Notably, the policy does not admit that such payments violate the MRA, but only that they might create the *appearance* of a violation. It offers no argument either against the claim that cash payments violate the MRA or in favor of the claim that they don’t. The policy also mentions the MRA in its discussion of aggregation. *Id.* at 34–35; *cf.* Suarez Memorandum, *supra* note 80, at 2–4.

92 H.R. 732, 115th Cong. (2017); *see H.R. 732 — 115th Congress (2017–2018)*, *supra* note 33 (showing the bill’s sponsor and date of introduction). There was also a Senate version of the bill. S. 333, 115th Cong. (2017). An earlier version of the bill, the “Stop Settlement Slush Funds Act of 2016,” had been introduced the previous year. H.R. 5063, 114th Cong. (2016); S. 3050, 114th Cong. (2016).

93 H.R. 732 at § 2(a).

94 Congressional debate on the bill made this clear. *See* 163 CONG. REC. 16377 (2017).

95 *Id.* at 16372–73 (statement of Rep. Darrell Issa).

96 *Id.* at 16362 (statement of Rep. Bob Goodlatte).

97 *Id.*

administration officials were concerned to make sure that third-party payments were directed to favored groups.⁹⁸

C. *The Trump and Biden Administrations*

On June 5, 2017, Attorney General Jeff Sessions issued a memorandum acknowledging that “[s]ettlements, including civil settlement agreements, deferred prosecution agreements, non-prosecution agreements, and plea agreements, are a useful tool for Department attorneys to achieve the ends of justice at a reasonable cost to the taxpayer,” and explaining that “[t]he goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct.”⁹⁹ Sessions described the Department’s practice of including in settlement agreements payments to nongovernmental third parties (“neither victims nor parties to the lawsuits”) and announced that DOJ would “no longer engage in this practice.”¹⁰⁰ His directive provided that “Department attorneys [could] not enter into any agreement on behalf of the United States in settlement of federal claims or charges . . . that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute,” effective immediately.¹⁰¹ The new policy applied to “all civil and criminal cases litigated under the direction of the Attorney General.”¹⁰² Sessions allowed for three “limited exceptions” to the new policy against third-party payments.¹⁰³

1. Implementing the Sessions Memo

Seven months later, Jeffrey Wood, then serving as the Acting Assistant Attorney General for the Environment and Natural Resources Division (ENRD) of the Department of Justice, issued his own memorandum to explain how the policy announced by Attorney General Sessions the previous June would be implemented within the ENRD.¹⁰⁴ In

98 *Id.* at 16363 (Exhibits B & C).

99 Sessions Memorandum, *supra* note 22.

100 *Id.*

101 *Id.*

102 *Id.* (including “civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements”).

103 *Id.* (“First, the policy does not apply to an otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment or from official corruption. Second, the policy does not apply to payments for legal or other professional services rendered in connection with the case. Third, the policy does not apply to payments expressly authorized by statute, including restitution and forfeiture.”).

104 Memorandum from Jeffrey H. Wood, Acting Assistant Att’y Gen., Env’t & Nat. Res. Div., U.S. Dep’t of Just., to ENRD Deputy Assistant Att’y’s Gen. & Section Chiefs (Jan. 9,

accordance with the departmental policy, he announced that ENRD Attorneys would not enter into any settlement agreements that included third-party payments unless such payments both fit into one of the three limited categories of exceptions from the Sessions memo *and* had been previously authorized by the Assistant Attorney General.¹⁰⁵

The Wood memo hinted at various concerns about third-party payments that were driving the adoption of the new policy. Besides a general interest in compliance “with all applicable statutory authorities and controlling court precedents,” the memo expressed a concern for ensuring that all settlement agreements “promote legitimate goals of federal environmental enforcement.”¹⁰⁶ One particular concern was that settlement agreements might be used to duplicate programs already authorized and funded by Congress.¹⁰⁷ Another concern appeared to be that, since “Congress has established amounts for assessing penalties in environmental cases,” a third-party payment that served “as an offset or otherwise . . . allow[ed] for a reduction in the imposition of civil or criminal monetary penalties” would effectively be redirecting money that Congress had destined for the U.S. Treasury.¹⁰⁸ Finally, there was a concern regarding the potential for abuse and conflicts of interest, with the memo “absolutely prohibit[ing]” any third-party payments which would “fund political activities, lobbying, litigation, or other activities that do not remedy environmental harm.”¹⁰⁹ The memo also insisted that even “[w]hen inclusion of a third-party payment provision is appropriate and consistent with” the new policy, “[i]n no case should a third party be selected on the basis of political affiliation, personal relationship with or financial interest of any person or entity involved in the case, or any other improper basis.”¹¹⁰

Interestingly, the Wood memo explicitly disclaimed that it would have any effect on SEPs, noting that the new policy “does not prohibit, as part of a settlement, a defendant from agreeing to undertake a supplemental environmental project related to the violation,” provided that the SEP was consistent with EPA’s SEP policy.¹¹¹ However, the

2018) [hereinafter Wood Memorandum], https://www.justice.gov/d9/2023-06/aag_wood_third_party_payments_memo_1_9_18.pdf [<https://perma.cc/9D9G-DLCA>].

105 *Id.* at 1.

106 *Id.* at 2.

107 *Id.* (emphasizing that “the Division w[ould] closely scrutinize any . . . proposed third-party payment” that “would fund an activity that is essentially the same as one for which Congress has already authorized and funded a program”).

108 *Id.* (“Absent explicit authorization from Congress to the contrary, penalties, when recovered, are directed to the United States Treasury for further appropriation by Congress.”).

109 *Id.*

110 *Id.* at 6.

111 *Id.* at 8.

memo pointed out that that policy “already expressly prohibits *all* third-party payments.”¹¹²

Later that year, the Attorney General issued another memorandum explaining the Department’s approach to civil consent decrees and settlement agreements with state and local government entities.¹¹³ The motivating concern appears to have been an interest in respecting the principles of federalism and the special role of states as sovereigns in the American constitutional order.¹¹⁴ Among other requirements, this memo insisted that consent decrees “must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.”¹¹⁵ The purpose of this requirement was to ensure that the determination of “state and local policy goals remain[ed] with democratically accountable state and local institutions.”¹¹⁶ On the one hand, this policy protected states (or local government entities) from being strong-armed by the federal government into adopting policies that the federal government could not have achieved by seeing the dispute through to a litigated judgment, and on the other hand, it also protected the people from having new policies adopted collusively through a settlement agreement rather than openly through the ordinary political process.¹¹⁷

2. The Clark Memos

The next year, Assistant Attorney General Jeffrey Clark leveraged this provision of the second Sessions memo to shut down the use of SEPs in consent decrees.¹¹⁸ His memo pointed to language in EPA’s 2015 SEP policy that defined SEPs as “projects or activities that *go beyond* what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable

112 *Id.* (emphasis added); *see* 2015 POLICY, *supra* note 21, at 17.

113 Memorandum from the Att’y Gen. to Heads of Civ. Litigating Components, U.S. Att’y’s (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/dl?inline> [<https://perma.cc/6PFC-X5RM>].

114 *See id.* at 1.

115 *Id.* at 5.

116 Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen., Env’t & Nat. Res. Div., U.S. Dep’t of Just., to ENRD Deputy Assistant Att’y Gens. & Chiefs of the Env’tl Enf’t, Env’tl Def., Env’tl Crimes, Nat. Res. & Wildlife & Marine Res. Sections 1 (Aug. 21, 2019) [hereinafter 2019 Clark Memorandum], https://www.justice.gov/d9/2023-06/enrd_state_and_local_sep_memo_public_8_21_19.pdf [<https://perma.cc/RQU4-TBBU>].

117 *Cf. id.*

118 *Id.* at 2.

laws.”¹¹⁹ Arguing that “because, by definition, SEPs are projects agreed to in settlements that *go beyond* what is required” by law, the memo concluded that “proposed consent decrees and settlements containing them are generally precluded” by the policy described in the Attorney General’s recent memo.¹²⁰ Clark’s memo analyzed the background considerations leading to this conclusion, explaining why monetary penalties assessed under statutes like the Clean Water Act¹²¹ had to be deposited in the U.S. Treasury.¹²² Building on constitutional principles,¹²³ Congress had passed the Miscellaneous Receipts Act and the Antideficiency Act in order to “protect its constitutional power of the purse against intrusion from the Executive Branch.”¹²⁴ The memo also explained how previous OLC and GAO opinions had raised objections to settlements that directed money to nonparties, leading EPA to revise its SEP policy.¹²⁵ And yet even with these limitations, “SEPs remain controversial.”¹²⁶ Consequently, the Assistant Attorney General indicated that he would be conducting a “broader review” of SEP policy.¹²⁷

That review resulted in yet another memo in March 2020, which noted that the diversion of cash from the U.S. Treasury through consent decrees and settlement agreements had “long been deemed improper and inconsistent with the Miscellaneous Receipts Act, absent authorization from Congress.”¹²⁸ SEPs, however, had been accepted “in exchange for a reduction of a penalty” in settlement agreements, establishing a “mathematical relationship between penalties and SEPs,” which led to the “inescapable” conclusion that SEPs violated the MRA.¹²⁹ As a result, the memo announced that SEPs would “no longer be part of the suite of relief the Environment and Natural Resources Division seeks in its cases (unless specifically authorized by Congress).”¹³⁰ After reviewing the background principles at stake with the use of SEPs, the settlement authority of the Attorney General, the

119 2015 POLICY, *supra* note 21, at 1 (emphasis added).

120 2019 Clark Memorandum, *supra* note 116, at 1–2. This memo acknowledged the existence of an argument for exempting SEPs from the policy because Congress had implicitly approved them in the America’s Water Infrastructure Act of 2018, Pub. L. No. 115-270, 132 Stat. 3765, but found the argument unpersuasive because the Act did not clearly demonstrate Congress’s intent. 2019 Clark Memorandum, *supra* note 116, at 2.

121 Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816.

122 2019 Clark Memorandum, *supra* note 116, at 2.

123 *See* U.S. CONST. art. I, § 8, cl. 1 (Taxing and Spending Clause); U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause).

124 2019 Clark Memorandum, *supra* note 116, at 3.

125 *Id.* at 3–4.

126 *Id.* at 4.

127 *Id.* at 12–13.

128 2020 Clark Memorandum, *supra* note 22, at 1.

129 *Id.* at 2.

130 *Id.*

history of SEPs, and the development of policies around them,¹³¹ the Assistant Attorney General concluded that the “Division w[ould] no longer compromise civil penalties that would otherwise be deposited in the Treasury in exchange for” SEPs because “SEPs violate the spirit, if not the letter, of the Miscellaneous Receipts Act, which is intended to protect Congress’ constitutional power of the purse.”¹³² This conclusion represented a perhaps surprising development in the Justice Department’s (or at least the ENRD’s) approach toward SEPs. The Wood memo two years earlier had explicitly indicated that the Department’s new policy regarding third-party payments would not have any direct impact on SEPs,¹³³ but now the Clark memo had unpacked the principles of the Departmental policy to conclude that all SEPs not specifically authorized by Congress were beyond the settlement authority of the Attorney General.¹³⁴

3. Eliminating Third-Party Payments . . .

Later that year, the Attorney General, by now William Barr, issued an order, adopting—as a final rule—the policy originally promulgated by Attorney General Sessions three years earlier which had prohibited the use of third-party payments in settlement agreements, subject to certain limited exceptions.¹³⁵ The new final rule both expanded the proscription and supplemented the exceptions.¹³⁶ The expanded prohibition explicitly covered third-party payments whether made “in cash *or in kind*” in order to cut off the possibility of “circumvention of the policy reflected in [the Miscellaneous Receipts Act] via the use of in-kind payments.”¹³⁷ The revised exceptions to the general policy, while continuing to allow for lawful payments that “provide[] restitution or compensation to a victim,” explicitly forbade any settlement

131 *Id.* at 3–11.

132 *Id.* at 11. Whether they violate the “spirit” or the “letter” of the MRA may depend on how one feels about “constructive receipt,” *see infra* text accompanying notes 165–67, but the same memo also reached the conclusion that “[u]sing SEPs in settlements . . . is inconsistent with the spirit *and the letter* of the law as well as DOJ policy,” regardless of whether the SEPs provide for direct or indirect payments to third parties, 2020 Clark Memorandum, *supra* note 22, at 11 (emphasis added).

133 *See supra* notes 111–12 and accompanying text.

134 2020 Clark Memorandum, *supra* note 22, at 2.

135 Prohibition on Settlement Payments to Non-Governmental Third Parties, 85 Fed. Reg. 81409 (Dec. 16, 2020) [hereinafter 2020 Rule].

136 Action Memorandum from Steven A. Engel, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., to William P. Barr, Att’y Gen. 1 (Dec. 4, 2020) [hereinafter Action Memorandum], <https://www.justice.gov/d9/2023-02/02.14.23.%20-%20Settlement%20Agreements%20Third%20Parties.pdf> [https://perma.cc/9BQV-YCCX].

137 2020 Rule, *supra* note 135, at 81409 (emphasis added).

agreement from accepting a SEP “in lieu of payment to the Federal Government.”¹³⁸ The new final rule was published in the *Federal Register* on December 16, 2020, and was effective immediately.¹³⁹

The next month, in the final days of the Trump Administration, Assistant Attorney General Clark issued a few more memos dealing with SEPs. In one he considered equitable mitigation, explaining why his previous memo concluding that SEPs were “illegal absent explicit Congressional authorization” had allowed a carveout for “payments that ‘directly’ remedy the harm that is sought to be redressed in a case, including for example, harm to the environment.”¹⁴⁰ This memo distinguished between SEPs and mitigation:

SEPs are designed to offset the penalty amount and, by definition, differ from mitigation relief in that they cannot be ordered by a court as they do not remedy the specific harm at issue in the case, but rather purport to benefit the environment in a more general way, typically in exchange for a reduction in monetary penalties that would otherwise be payable to the U.S. Treasury.¹⁴¹

As a result, “because they exceed the quantum of relief that can be obtained in equity, SEPs are therefore by definition a form of congressionally unauthorized penalty.”¹⁴²

In a second memo issued the very next day, Clark offered “some brief discussion and elaboration” on the new rule promulgated by Attorney General Barr’s December order.¹⁴³ This memo emphasized the need to clearly distinguish between SEPs and mitigation (dealt with in the previous day’s memo) and highlighted the new rule’s clarification that the statutory restrictions of the MRA and ADA could “not be circumvented through in-kind (as opposed to monetary) transfers.”¹⁴⁴ Discussing the fundamental legal problem with SEPs, he concluded that, because “they [are] accepted in lieu of penalties and thus effectively divert[] funds that otherwise would go to the Treasury to private projects without the consent of Congress,” they violate the MRA and ADA.¹⁴⁵

138 *Id.* at 81410.

139 *Id.* at 81409.

140 Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen. (ENRD), Env’t & Nat. Res. Div., U.S. Dep’t of Just., to ENRD Deputy Assistant Att’y Gen. & Section Chiefs 1 (Jan. 12, 2021) [hereinafter Mitigation Memorandum], https://www.justice.gov/d9/2023-06/enrd_mitigation_memo_1.12.2021.pdf [<https://perma.cc/Q4YC-J6B2>] (quoting 2020 Clark Memorandum, *supra* note 22, at 15 n.18).

141 *Id.* at 5.

142 *Id.*

143 2021 Clark Memorandum, *supra* note 20, at 3.

144 *Id.*

145 *Id.* at 4.

4. . . . and Bringing Them Back

Given all the effort the Trump administration expended in explaining the problems with SEPs (and third-party payments more generally) and in working to prohibit their use in consent decrees and settlement agreements, one might have thought the policy against them would be fairly stable. Alas, such was not the case. The final rule promulgated by Attorney General Barr lasted for less than a year and a half. Under the Biden administration, the new Attorney General Merrick Garland issued a memo of his own explaining that he would be revoking the rule.¹⁴⁶ His response to the legal concerns raised by the previous administration was perfunctory at best;¹⁴⁷ the memo simply noted that it “ha[d] been the consistent view of the Office of Legal Counsel, including in 2020 when the Justice Department’s current regulation was promulgated, that settlements involving payments to non-governmental third parties, if properly structured, d[id] not violate the Miscellaneous Receipts Act.”¹⁴⁸ The memo begged the question by extolling the virtues of third-party payments when used “appropriately.”¹⁴⁹

146 Memorandum from the Att’y Gen. to Heads of Dep’t Components, U.S. Att’y’s 2 (May 5, 2022) [hereinafter 2022 Memorandum], https://www.justice.gov/d9/pages/attachments/2022/05/05/02_ag_guidelines_and_limitations_memorandum_0.pdf [<https://perma.cc/X55K-R3G3>]. The incoming Biden administration had telegraphed its intentions, so the prompt restoration of SEPs was not surprising. See *Return of SEPs*, *supra* note 15, at 1:41, 2:08.

147 The Environment and Natural Resources Division had “withdrawn,” pursuant to an Executive Order signed on President Biden’s first day in office, most of the memoranda issued during the Trump administration explaining these concerns. The full explanation given for the withdrawal was that these memoranda were “inconsistent with longstanding Division policy and practice and [might] impede the full exercise of enforcement discretion in the Division’s cases.” Memorandum from Jean E. Williams, Deputy Assistant Att’y Gen., Env’t & Nat. Res. Div., U.S. Dep’t of Just., to ENRD Section Chiefs & Deputy Section Chiefs 1, 2 (Feb. 4, 2021) [hereinafter Williams Memorandum], <https://www.justice.gov/enrd/page/file/1364716/dl> [<https://perma.cc/954T-PB2K>] (withdrawing the Wood Memorandum, *supra* note 104; the 2019 Clark Memorandum, *supra* note 116; the 2020 Clark Memorandum, *supra* note 22; the Mitigation Memorandum, *supra* note 140; the 2021 Clark Memorandum, *supra* note 20; and four others, Williams Memorandum, *supra*, at 1–2). See Final Rule, *supra* note 83, at 97530 (noting that the 2020 Clark Memorandum, *supra* note 22, and related memoranda “ha[d] been withdrawn and w[ere] not adopted more broadly by the Department”).

148 2022 Memorandum, *supra* note 146, at 1. A “properly structured” SEP appears to be one that complies with the criteria laid out in OLC’s 2006 *Softwood Lumber* opinion. Compare *id.* at 1 n.2 (referring to the Action Memorandum at 2), with Action Memorandum, *supra* note 136, at 2 (referring to the *Softwood Lumber* opinion at 119). For details about the *Softwood Lumber* criteria, see *infra* text accompanying notes 250–52.

149 2022 Memorandum, *supra* note 146, at 1. The bureaucracy’s persistent commitment to SEPs despite all their problems may be a reflection of the same “religious impulse” found elsewhere in our environmental policy “to do something.” Michael Buschbacher, *Against Self-Defeating Climate Policy*, 18 FIU L. REV. 313, 325 (2024).

And although it described the policy implemented under the Trump administration as “more restrictive and less tailored than necessary to address concerns that these agreements could be used to inappropriately fund projects unrelated to the harm involved in the matter,” it failed to indicate in any way how that policy was either “more restrictive” or “less tailored” than necessary.¹⁵⁰ A new interim final rule revoking the final rule promulgated by Attorney General Barr was published in the *Federal Register* on May 10, 2022, and effective the same day.¹⁵¹

Finally, on December 9, 2024, the Attorney General issued a final rule adopting the interim final rule without change.¹⁵² The final rule defended the use of SEPs (and third-party payments more generally) as a continuation of a decades-long practice by the federal government in negotiating settlement agreements—a practice which allows “the United States to more fully accomplish the goals of civil and criminal enforcement”—and specifically highlighted the value of SEPs in helping “to counteract some of the downstream effects of a violation . . . [or] prevent future harm.”¹⁵³ DOJ characterized the restored practice as “appropriate,” able to “comport with the Miscellaneous Receipts Act,” and designed with safeguards to ensure the appropriate tailoring of such payments.¹⁵⁴ But it also announced a *new* limitation to be adopted in the *Justice Manual* which would allow settlements to be conditioned on the inclusion of a third-party payment only if “the remedy in question would be available relief were the case litigated to judgment.”¹⁵⁵ The final rule also responded at length to public comments submitted in response to the interim final rule.¹⁵⁶ Notably DOJ accepted that the MRA applied to constructive receipt of funds but denied—while leaning heavily on OLC’s 2006 *Softwood Lumber*

150 2022 Memorandum, *supra* note 146, at 2.

151 Rule Repeal, *supra* note 25.

152 Final Rule, *supra* note 83, at 97538 (“[T]he interim final rule . . . is adopted as final without change.”).

153 *Id.* at 97525, 97526 (“For decades and across Administrations, Department components entered into settlement agreements that involved payments to certain third parties as a means of addressing harms arising from violations of Federal law.” *Id.* at 97525; *see also id.* at 97536.).

154 *Id.* at 97525–26. DOJ went so far as to claim that its restored practice “goes beyond what the Appropriations Clause and the MRA require.” *Id.* at 97531; *cf. id.* at 97530 (“[S]ettlements that include third-party payments do not violate the ADA.”).

155 *Id.* at 97526, 97526–27; *see also id.* at 97534. It also provided for the adoption of expanded opportunities for public comment on proposed consent decrees. *Id.* at 97527, 97534.

156 *Id.* at 97527–37. To the extent that the commenters had relied on the various withdrawn memoranda, *see supra* note 147, this means that the final rule did finally engage—albeit indirectly—with the legal arguments made by the previous administration in limiting and abolishing the use of SEPs and third-party payments.

opinion¹⁵⁷—that third-party payments (including SEPs) involved constructive receipt.¹⁵⁸ Finally (and somewhat implausibly), the government flatly denied that its policy authorized “third-party payments in any context to be made ‘in exchange for a lower civil penalty.’”¹⁵⁹

II. WHAT’S WRONG WITH SEPS?

Over the last several decades, SEPs have been subject to criticism from both inside and outside government. In addition to a number of policy concerns raised against SEPs, a variety of legal arguments have been marshalled against them. Ultimately the legal arguments all turn on the simple fact that SEPs are inconsistent with the principle that Congress has the exclusive power of the purse. Congress has passed specific statutes to protect this power, and as a result SEPs violate both the Miscellaneous Receipts Act and the Antideficiency Act. There are also deeper constitutional principles at stake, principles which SEPs are conceptually incompatible with, even beyond the specific statutory instantiations of those principles. And although several precedents from the Office of Legal Counsel and the courts of appeals have seemed to bless the use of SEPs, a close reading reveals that these precedents do not provide adequate support to overcome the statutory and constitutional problems that SEPs face.

A. Statutory Problems

Third-party payments of any kind (including SEPs) in a consent agreement constitute public funds. Although the funds are not actually received by the government because they are diverted, the law looks to substance rather than form, as a result of which such funds have long been understood to be *constructively* received by the government.¹⁶⁰ Thus, SEPs constitute public funds,¹⁶¹ and their inclusion in settlement agreements is unlawful because it contravenes statutory

157 See *infra* subsection II.C.2.

158 Final Rule, *supra* note 83, at 97527–30.

159 *Id.* at 97535; see also *id.* at 97530 (denying that “a third-party payment in the form of a SEP amounts to an agreement to trade back part of the penalty that would constitute public money subject to the MRA”).

160 See *Steuart Transportation*, *supra* note 36, at 688 (“The doctrine of constructive receipt will ignore the form of a transaction in order to get to its substance.”); see also discussion *infra* subsection II.C.1. DOJ has argued that Congress itself “views SEPs as diverted penalties.” 2021 Clark Memorandum, *supra* note 20, at 5.

161 Letter from John M. O’Connor, Okla. Att’y Gen., et al., to Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just. 2 (July 11, 2022) [hereinafter Letter of State AGs], <https://www.regulations.gov/comment/DOJ-OAG-2022-0001-0014> [<https://perma.cc/R93E-HPDX>] (“[M]oney in the Treasury and money *owed to* the Treasury are equally public funds within the control of Congress.”).

requirements that such payments be deposited in the Treasury and not be spent without congressional appropriation.¹⁶²

1. The Miscellaneous Receipts Act

The Miscellaneous Receipts Act presents the most obvious statutory difficulty for SEPs.¹⁶³ The MRA provides that government officials “receiving money for the Government from any source shall deposit the money in the Treasury.”¹⁶⁴ This provision would obviously cover any penalties paid to the government by a defendant as part of a settlement agreement. But whether other funds spent as part of the settlement agreement would be subject to the Miscellaneous Receipts Act turns on the question of whether they are “receiv[ed].” This is where the doctrine of constructive receipt comes into play.¹⁶⁵ According to longstanding guidance from the Office of Legal Counsel, “money available to the United States and directed to another recipient is constructively ‘received’ for purposes of [the MRA].”¹⁶⁶ Under this understanding of constructive receipt, the MRA thus applies also to expenditures on SEPs, and “the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of [the MRA], [because] a federal agency could have accepted possession and retains discretion to direct the use of the money.”¹⁶⁷

In this context, it is worth recalling the history of SEPs and EPA’s treatment of them. When the term “supplemental environmental

162 Cf. Comment of Beverly McKittrick, Dir., Regul. Action Ctr., FreedomWorks Found. 1 (July 11, 2022) [hereinafter FreedomWorks Comment], <https://www.regulations.gov/comment/DOJ-OAG-2022-0001-0007> [<https://perma.cc/9KCQ-YE89>] (“This settlement money is *taxpayer money*. Our Constitution gives the power to appropriate taxpayer money only to the Congress, and Congress enacts excruciatingly detailed appropriations measures each fiscal year directing executive branch agencies on how to spend the money. Agencies are not given lump sums to spend as they see fit. If DOJ believes that a particular group deserves taxpayer funding, it should submit that request to Congress as part of its budget request.” (footnote omitted)). *Contra* Alvarez et al., *supra* note 88, at 10390 (“SEPs do not violate the MRA because they do not involve ‘public money’ . . .”).

163 Indeed, the MRA is seemingly the only statutory provision that EPA ever considered might pose a problem for SEPs. See *supra* notes 78, 80–82, 91 and accompanying text.

164 31 U.S.C. § 3302(b) (2018) (previously codified at 31 U.S.C. § 484).

165 Even proponents of SEPs have admitted that “[c]ourts have held the MRA applies to a variety of funds that are received or *should be received* by the government.” Alvarez et al., *supra* note 88, at 10388 (emphasis added).

166 *Stewart Transportation*, *supra* note 36, at 688. In a later opinion, OLC confirmed that the government’s ability to receive the funds in question was essential to its analysis, finding in a different case that funds were not received for purposes of the MRA because “the Government asserted no claim for money damages or penalties.” Application of 31 U.S.C. § 3302(b) to Settlement of Suit Brought by the United States, 7 Op. O.L.C. 36, 38 (1983).

167 *Stewart Transportation*, *supra* note 36, at 688.

project” was originally introduced by EPA in 1991, it explicitly served as a replacement to describe what had previously been termed “alternative payments.”¹⁶⁸ *Alternative to what?* The obvious answer is *to paying money to the government*. Indeed, the correctness of this answer is borne out by the fact that SEPs have always been understood by EPA to operate as a mechanism by which alleged violators could achieve “a reduction in the amount of the assessed civil penalty” (i.e., money owed to the government).¹⁶⁹ Thus, by EPA’s own admission SEPs represent money which “a federal agency could have accepted possession” of and which EPA, through its consent agreements, “retains discretion to direct the use of.”¹⁷⁰ But these are precisely the criteria which OLC used to recognize the kind of constructive receipt that triggers the provisions of the MRA. Thus, there should be no dispute about whether or not SEPs violate the MRA. They do.¹⁷¹

2. The Antideficiency Act

Less frequently considered—but posing no less of a problem for SEPs—is the Antideficiency Act.¹⁷² The ADA prohibits government officials from expending funds (or incurring financial obligations) in excess of appropriations.¹⁷³ SEPs, however, allow government officials to authorize the expenditure of public money not appropriated by Congress or in ways not authorized by law. In fact, in an attempt to avoid

168 1991 POLICY, *supra* note 29, at *1.

169 *Id.*; see also 1998 POLICY, *supra* note 21, at 12–17 (explaining how to calculate the appropriate “penalty mitigation” for a SEP, *id.* at 15 n.17); 2015 POLICY, *supra* note 21, at 22–24 (same).

170 *Steuart Transportation*, *supra* note 36, at 688.

171 *Cf.* 1993 GAO Letter, *supra* note 62, at 2 (concluding that SEPs are unlawful because “allowing alleged violators to make payments to an institution other than the federal government for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents [the MRA]”).

172 *But see* Wood Memorandum, *supra* note 104, at 8 (insisting that all third-party payments, including SEPs, had to be consistent with the ADA, among “other applicable laws and regulations”). Two later memos discussed the ADA without analyzing the extent to which SEPs might be inconsistent with it. 2019 Clark Memorandum, *supra* note 116, at 2–3, 7; 2021 Clark Memorandum, *supra* note 20, at 3–5. Legal scholarship has occasionally considered the problem which the ADA poses for SEPs. See, e.g., Michael J. Amato, Note, *The Best and Worst Form of Environmental Enforcement: Third-Party Payments and Executive Settlement Policy*, 110 GEO. L.J. 1171, 1187, 1191 n.160 (2022).

173 31 U.S.C. § 1341 (2018 & Supp. III 2022) (“[A]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . .”).

the “augmentation” problem,¹⁷⁴ EPA policy explicitly requires that SEPs not be used to fund projects or activities for which Congress has appropriated funds.¹⁷⁵ The policy also specifies that SEPs may not be used to fund activities for which “a federal statute prohibits the expenditure of federal resources.”¹⁷⁶ The operative theory appears to be that as long as Congress has neither funded nor prohibited funding a particular activity, it exists in some kind of gray area where Congress’s power of the purse does not extend. This is a poor reading of the relevant statutory authority. The ADA prohibits government officials from “authoriz[ing] an expenditure . . . exceeding an amount available in an appropriation.”¹⁷⁷ In the case of an activity which Congress has chosen not to fund, the “amount available in an appropriation” is *zero*, and *any* expenditure on that activity exceeds the appropriated amount.¹⁷⁸ Thus by definition, all SEPs violate the ADA.

The basic problem for SEPs is that the Antideficiency Act is itself an anti-augmentation statute. It was passed by Congress “to prohibit the obligation of federal funds for which there was no existing appropriation.”¹⁷⁹ But SEPs are designed to do exactly this: they obligate public funds (which the government could have received) for purposes for which there is no existing appropriation.¹⁸⁰ This is a clear violation of the ADA.¹⁸¹

* * *

Lest there be any doubt, the implication for SEPs of these statutory provisions is clarified by Congress’s own approach toward SEPs in

174 See *supra* note 79 and accompanying text. The problem of augmentation of appropriations was raised repeatedly by GAO in its analyses of third-party payments. *In re* NRC, *supra* note 44, at 19 (noting “the general rule against augmentation of appropriations”); 1992 GAO Letter, *supra* note 28, at *3 (same); 1993 GAO Letter, *supra* note 62, at 2–3 (concluding that SEPs involved an improper augmentation of appropriations).

175 2015 POLICY, *supra* note 21, at 9–11.

176 *Id.* at 9.

177 31 U.S.C. § 1341(a)(1)(A) (2018).

178 Cf. Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1356 (1988) (arguing that federal agencies’ activities are “authorized only to the extent of their appropriations”).

179 Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 330.

180 Cf. Letter from Frank D. Garrison, Att’y, & Alison E. Somin, Legal Fellow, Pac. Legal Found., to Robert Hinchman, Senior Couns., Off. of Legal Pol’y, Dep’t of Just. 8–9 (July 11, 2022) [hereinafter PLF Letter], <https://www.regulations.gov/comment/DOJ-OAG-2022-0001-0016> [<https://perma.cc/2F5C-TS35>] (“SEPs allow those that have potentially violated the law to reduce their liability in exchange for funding projects that Congress has not approved or appropriated funds for.”).

181 Without referring to the ADA, GAO understood the logic of this problem decades ago, explaining that “an interpretation of an agency’s prosecutorial authority to allow” projects like SEPs “would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process.” 1993 GAO Letter, *supra* note 62, at 2–3.

the one case where they have been clearly authorized.¹⁸² A statutory provision passed in 2008 allows for diesel emissions reduction SEPs, “notwithstanding sections 3302 and 1301 of title 31,” referring to the MRA and ADA, respectively.¹⁸³ As Assistant Attorney General Clark explained, “The clear implication of this language is that, without express congressional authorization, diesel emission SEPs (and therefore all SEPs) *do* violate the MRA and the ADA.”¹⁸⁴

B. Constitutional Problems

Granted that SEPs generally violate the MRA and ADA, the statutory difficulties are merely symptomatic of a deeper problem because Congress enacted these statutes to protect its constitutional “power of the purse.”¹⁸⁵ It is well settled that the Constitution grants Congress the “exclusive authority to determine how to spend funds deposited in the Treasury.”¹⁸⁶ This is a fundamental principle of the separation of powers, derived from the Taxing and Spending Clause and the Appropriations Clause.¹⁸⁷ A long history of executive attempts to circumvent the constitutional grant of this power exclusively to Congress led to the passage of various statutes intended to fortify the constitutional scheme, including the Antideficiency Act and the Miscellaneous Receipts Act.¹⁸⁸ The consequence of this is that violations of the ADA and

182 There has been “only one occasion” where Congress has “seen fit to give the Executive branch permission to seek SEPs: 42 U.S.C. § 16138, which authorizes the use of diesel emissions SEPs in Clean Air Act settlements.” 2021 Clark Memorandum, *supra* note 20, at 5. But for a claim that there may have been a second occasion, see *supra* note 83.

183 42 U.S.C. § 16138 (2018).

184 2021 Clark Memorandum, *supra* note 20, at 5; *cf.* 2020 Clark Memorandum, *supra* note 22, at 18 (“That Congress has given EPA the authority to settle using SEPs of a single type leads one to conclude, in *expressio unius est exclusio alterius* fashion, that Congress has not affirmatively approved of all forms of SEPs.”). *But see supra* note 88. Explicit congressional authorization for SEPs is probably adequate (in the ordinary case) to overcome both statutory and constitutional objections to them. *See* 2020 Clark Memorandum, *supra* note 22, at 17–18 (explaining that while “Congress may no doubt specifically authorize the Executive Branch to redirect money otherwise payable to the Treasury,” it “has not spoken with the clear intent to give the Executive Branch the authority to negotiate for, or settle for, SEPs”).

185 2020 Clark Memorandum, *supra* note 22, at 3.

186 *Id.*

187 *See id.*; U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes”); U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

188 Peterson, *supra* note 179, at 330–31 (noting that executive “evasion of its appropriations authority” eventually got so bad that Congress felt compelled “to provide criminal sanctions for the violation of [the ADA’s] provisions”).

MRA imply, *a fortiori*, constitutional violations as well. If SEPs are unlawful, they are also unconstitutional.¹⁸⁹ But even if statutory arguments against SEPs fail, because the constitutional principles at stake are broader and deeper than what the MRA and ADA capture, SEPs can still violate the Constitution.

1. The Power of the Purse

The basic point is simply that the Constitution gives *Congress* exclusive control over what we know as the “power of the purse.”¹⁹⁰ Having learned from history, the Framers “set in place a system of checks and balances and separation of powers, and lodged the control of the purse in the ‘people’s branch,’ to prevent the rise of a new coinage of imperial executives in the federation that they created.”¹⁹¹ James Madison wrote that the “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”¹⁹² And Alexander Hamilton’s famous passage about the judiciary being the least dangerous branch of government because it has “neither force nor will” actually draws that conclusion in reference to Congress’s power of the purse:

The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse[,] no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment¹⁹³

The Supreme Court has counseled that great respect is due to the authors of *The Federalist*, and those authors clearly believed that

189 Cf. PLF Letter, *supra* note 180, at 7 (“[W]hen the Department or any executive agency receives funds through a settlement agreement and does not deposit that money into the treasury, it has violated [both] the Constitution *and* Miscellaneous Receipts Act.” (emphasis added)).

190 “The absolute control of the moneys of the United States is in Congress” Hart’s Case, 16 Ct. Cl. 459, 484 (1880), *aff’d sub nom.* Hart v. United States, 118 U.S. 62 (1886); cf. Peterson, *supra* note 179, at 329 (“The Constitution clearly and unambiguously places control over the appropriation of federal funds squarely in the hands of Congress.”).

191 ROBERT C. BYRD, *THE SENATE OF THE ROMAN REPUBLIC: ADDRESSES ON THE HISTORY OF ROMAN CONSTITUTIONALISM* 186 (1995).

192 THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

193 THE FEDERALIST NO. 78, *supra* note 192, at 465 (Alexander Hamilton) (emphasis omitted).

Congress having exclusive power over the purse was a cornerstone of our constitutional system of government.¹⁹⁴

Joseph Story illuminated the purpose of this constitutional design by explaining that it was “highly proper, that congress should possess the power to decide, how and when any money should be applied” for public purposes.¹⁹⁵ The Constitution, he explained, made Congress the guardian of “the public treasure, the common fund of all,” with responsibility to publish “a regular account of the receipts and expenditures . . . [so] that the people may know, what money is expended, for what purposes, and by what authority.”¹⁹⁶ And Thomas Cooley emphasized that the Appropriations Clause was a particular protection against the executive branch unconstitutionally arrogating power to itself.¹⁹⁷ One simple consequence of this constitutional structure is that “there may be no spending in the name of the United States except pursuant to legislative appropriation.”¹⁹⁸

In more recent times, Robert Byrd, the longest-serving U.S. Senator in history,¹⁹⁹ believed that the power of the purse was the “most important power vested in Congress by the Constitution.”²⁰⁰ Byrd described the power of the purse as “the taproot of the tree of Anglo-Saxon/American liberty” and “the foundation of our constitutional system of checks and balances.”²⁰¹ And as part of his fight against the line-item veto, he delivered “from memory and without notes” a series

194 See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819) (“[T]he opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution.”).

195 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1342 (Boston, Hilliard, Gray & Co. 1833). Story’s stature was so great that Chief Justice Marshall preferred him as his own successor, and his *Commentaries* was “the most massive and most widely discussed treatise on constitutional law in pre-Civil War America.” John B. Cassoday, *James Kent and Joseph Story*, 12 Yale L.J. 146, 149 (1903); H. Jefferson Powell, *Joseph Story’s Commentaries on the Constitution: A Belated Review*, 94 Yale L.J. 1285, 1285 (1985).

196 3 STORY, *supra* note 195, § 1342.

197 THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 106 (Boston, Little, Brown & Co. 1880); *cf.* JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* § 227 (New York, American Book Co. 1840) (“If it were otherwise, the Executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.”). Cooley “ranks with Story among the foremost commentators on the Constitution.” Cooley, *Thomas McIntyre*, *THE OXFORD COMPANION TO LAW* (1980).

198 Stith, *supra* note 178, at 1357.

199 See 156 CONG. REC. 11821 (2010) (statement of Sen. Mitch McConnell).

200 Robert C. Byrd, *Follow the Money in Iraq* (Oct. 15, 2003), in *WE STAND PASSIVELY MUTE: SENATOR ROBERT C. BYRD’S IRAQ SPEECHES* 94, 98 (2004).

201 ROBERT C. BYRD, *ROBERT C. BYRD: CHILD OF THE APPALACHIAN COALFIELDS* 534, 614 (2015); *cf.* BYRD, *supra* note 191, at 41 (referring to “the critical role that the power over the purse plays in the constitutional mechanism of separation of powers and checks and balances handed down to us by the constitutional framers”); *id.* at 90.

of fourteen hourlong speeches “to point out the perils of shifting the control of the purse from the legislative branch to the executive.”²⁰²

2. The Limits of the Appropriations Clause

Early constitutional interpreters took a very stark view of the limits of the Appropriations Clause. “The supreme power over the treasury belongs to the legislature,” wrote one commentator, “and therefore no money can be drawn from it but in consequence of appropriations made by law.”²⁰³ William Rawle—who declined George Washington’s offer to become the nation’s first Attorney General²⁰⁴—held the clause to mean that, since a treaty is “not of itself an appropriation of monies in the treasury of the United States,” the money needed to fulfill a treaty obligation to pay a foreign power could not be drawn from the Treasury without an appropriation, no matter how strong “the obligation of good faith may be.”²⁰⁵ And St. George Tucker (who has been described as “the most significant legal scholar of the early nineteenth century”²⁰⁶) seemed to believe that the Appropriations Clause implied that even “an individual having a judgment against the United States, in his favour, [could not] recover his money” unless Congress passed an appropriation.²⁰⁷

202 BYRD, *supra* note 201, at 600. The speeches formed the basis of his book *The Senate of the Roman Republic*. BYRD, *supra* note 191. Although Byrd focused on Roman history, the Framers would also have been mindful of the English history of Parliament trying to control the spending of its kings, *see* THE FEDERALIST NO. 58, *supra* note 192, at 359 (James Madison), a dynamic artfully summarized by John Selden:

In all times the Princes in *England* have done something illegal to get Money: But then came a Parliament and all was well, the People and the Prince kis[sed] and were Friends, and so things were quiet for a while. Afterwards there was another Trick found out to get Money

Money, THE TABLE-TALK OF JOHN SELDEN (London, William Pickering 1847). Despite the Framers’ best intentions, *yet another* trick has been found out to get money: SEPs.

203 PETER S. DU PONCEAU, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES 33 (Philadelphia, Law Acad. of Phila. 1834).

204 Judith L. Van Buskirk, *Rawle, William*, THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW (2009).

205 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 66 (Philadelphia, H.C. Carey & I. Lea 1825). This work was “a leading text on the Constitution for the next 50 years.” Van Buskirk, *supra* note 204.

206 Davison M. Douglas, Foreword, *The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1112 (2006).

207 St. George Tucker, *Of the Constitution of the United States*, in BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE app. at 140, 353 n.† (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803). Tucker’s edition of *Blackstone* was “the first major treatise on American law . . . and the most comprehensive treatise on American constitutional law until around 1820.” Douglas, *supra* note 206, at 1114.

Joseph Story recognized Tucker's concern that "the provision, though generally excellent, [might be] defective in not having enabled the creditors of the government, and other persons having vested claims against it, to recover, and to be paid the amount judicially ascertained to be due to them out of the public treasury, without any appropriation."²⁰⁸ Story's response is illuminating:

Perhaps it is a defect. And yet it is by no means certain, that evils of an opposite nature might not arise, if the debts, judicially ascertained to be due to an individual by a regular judgment, were to be paid, of course, out of the public treasury. It might give an opportunity for collusion and corruption in the management of suits between the claimant, and the officers of the government, entrusted with the performance of this duty. . . . [T]he known fact, that the subject must pass in review before congress, induces a caution and integrity in making and substantiating claims, which would in a great measure be done away, if the claim were subject to no restraint, and no revision.²⁰⁹

Story was contemplating the settlement of a suit *against* the United States, rather than *by* the United States, but other than that one detail, his concerns seem remarkably similar to the concerns raised by opponents of SEPs and other third-party payments in the modern context.²¹⁰ And Story's conclusion is unmistakable: without a congressional appropriation, settlement money cannot be drawn from the Treasury.

Of course, in the statutory context, the doctrine of "constructive receipt" served to establish a violation even in situations where the money being spent was never actually deposited in the Treasury.²¹¹ The question is whether there is a similar consideration that applies in the *constitutional* context. A sound understanding of the constitutional separation of powers reveals that there is.

The Supreme Court recently considered this question—if not quite in these terms—in evaluating the funding mechanism provided by Congress for the Consumer Financial Protection Bureau. The Bureau draws funds from the Federal Reserve System, whose surplus funds "would otherwise be deposited into the general fund of the Treasury."²¹² The Court found this fact sufficient for the Bureau's funding to be "subject to the requirements of the Appropriations Clause" because "[w]hatever the scope of the term 'Treasury' in the

208 3 STORY, *supra* note 195, § 1343.

209 *Id.*

210 *Cf.* Gray & Buschbacher, *supra* note 15 (referring to SEPs as "lawless and collusive settlements" that "inevitably lead to corruption").

211 *See supra* notes 165–67 and accompanying text.

212 *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am.*, 144 S. Ct. 1474, 1481 (2024).

Appropriations Clause, money otherwise destined for the general fund of the Treasury qualifies.”²¹³ Put differently, the surplus funds in the Federal Reserve System are subject to the Appropriations Clause because they have been *constructively received* into the federal Treasury. The Court went on to hold that congressional appropriations satisfy the Appropriations Clause so long as they “identify a source of public funds and authorize the expenditure of those funds for designated purposes.”²¹⁴ By this standard, SEPs are a clear violation of the Appropriations Clause because they meet neither criterion.²¹⁵

The Supreme Court has found the Appropriations Clause to be straightforward: “It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”²¹⁶ This is a positive requirement because “[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress,”²¹⁷ and this rule “was intended as a restriction upon the disbursing authority of the Executive department.”²¹⁸ Indeed, “[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”²¹⁹

Considered another way, one Yale professor has explained that executive “agencies may not resort to nonappropriation financing *because their activities are authorized only to the extent of their appropriations*.”²²⁰ Moreover, the constitutional scheme implies that “[a]ll funds belonging to the United States—received from whatever source, however obtained, and whether in the form of cash, intangible property, or physical assets—are public monies, subject to public control and accountability” and thus that “all monies received by the United States are in ‘the Treasury’” in the constitutional sense.²²¹

213 *Id.*

214 *Id.*

215 The second criterion would seem to be especially damning because—with the exception of diesel emissions reduction SEPs under 42 U.S.C. § 16139—current policy essentially requires that SEPs be unrelated to any congressionally designated purpose of any kind. See 2015 POLICY, *supra* note 21, at 9–11; *cf.* Alvarez et al., *supra* note 88, at 10393.

216 *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

217 *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion) (citing *Reeside*, 52 U.S. (11 How.) at 291).

218 *Cincinnati Soap*, 301 U.S. at 321.

219 *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990).

220 Stith, *supra* note 178, at 1356.

221 *Id.*

3. Executive Discretion

All of this means that the discretion exercised by executive branch officials in deciding how to spend money that would otherwise be deposited in the U.S. Treasury infringes on the exclusive prerogative of Congress to determine how federal funds are disbursed.²²² This makes SEPs unconstitutional because, “by their design and intended purpose,” they both “reduce the amount paid into the Treasury” and “giv[e] the Executive Branch discretion over how the monies diverted from the Treasury will be spent,” thus “effectively mak[ing] the Executive Branch the quasi-appropriator of funds.”²²³ In order to respect the constitutional structure and separation of powers, the substance—and not merely the form—of the constitutional requirements must be upheld.²²⁴ Thus what the executive branch cannot do with money actually received in the Treasury, it cannot do with money that it diverts from the Treasury either.²²⁵

In the context of SEPs and other similar third-party payments, a settlement agreement negotiated by the executive branch involves *both* a decision about the value of the government’s claims against the alleged violator *and* a decision about how to spend the diverted funds.²²⁶ The former decision “is the only one that is within the purview of the executive agency’s power,” while “the second is a decision reserved for Congress.”²²⁷ In order to comply with the constitutional structure,

222 Cf. Paul Larkin, Jr. & Zack Smith, “*Brother, Can You Spare a Million Dollars?: Resurrecting the Justice Department’s ‘Slush Fund,’*” 19 GEO. J.L. & PUB. POL’Y 447, 465 (2021) (“[A]ll funds due to the federal government are subject to Congress’ prerogative to decide how to spend federal money.”).

223 2020 Clark Memorandum, *supra* note 22, at 16, 16–17.

224 “The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).

225 See *id.* (“The legal result must be the same, for what cannot be done directly cannot be done indirectly.”); Letter of State AGs, *supra* note 161, at 2 (“DOJ cannot escape the reality of what it is doing—usurping the legislative role—by creative settlement crafting.”); cf. Süth, *supra* note 178, at 1356 (“If the Executive could avoid limitations imposed by Congress in appropriations legislation—by *independently financing its activities with private funds*, transferring funds among appropriations accounts, or selling government assets and services—this would vitiate the foundational constitutional decision to empower Congress to determine what actions shall be undertaken in the name of the United States.” (emphasis added)).

226 JOHN ALLISON ET AL., REGUL. TRANSPARENCY PROJECT OF THE FEDERALIST SOC’Y, IMPROPER THIRD-PARTY PAYMENTS IN U.S. GOVERNMENT LITIGATION SETTLEMENTS 7 (2021) <https://regproject.org/wp-content/uploads/RTP-Enforcement-and-Agency-Coercion-Working-Group-Paper-Improper-Third-Party-Payments-In-US-Government-Litigation-Settlements.pdf> [https://perma.cc/JF2P-Q4VK].

227 *Id.*

federal settlement proceeds must be paid into the Treasury and then Congress can choose how to spend those funds and appropriate them accordingly.²²⁸ By choosing how to spend money that would otherwise have gone to the public Treasury, EPA violates the Constitution by claiming for itself the power of the purse which the Constitution grants exclusively to Congress.²²⁹

C. *Legal Precedents*

Despite the very serious objections to SEPs on both statutory and constitutional grounds, there are a handful of legal precedents which seem to appropiate SEPs and have been used to try to justify them.²³⁰ These include two opinions from the courts of appeals and one from the Office of Legal Counsel; however, when carefully read and properly understood, none of these offer the support that they are often thought to provide, and they cannot answer the grave concerns already described.

1. The Courts of Appeals

In 1990, the federal courts of appeals issued two decisions that supporters of SEPs have occasionally cited to support the idea that the MRA does not apply to SEPs.²³¹ Both cases involved citizen suits under the Clean Water Act.

In the first case, the district court had refused to approve the proposed consent decree because it found that “the payments to be made [to various private environmental organizations] under the proposed consent judgment were civil penalties within the meaning of the

228 *Id.*; cf. Letter of State AGs, *supra* note 161, at 2 (“The DOJ may reasonably exercise executive discretion in choosing whether and when to settle a lawsuit. When it chooses to funnel the funds derived from that discretion to a third party, though, it intrudes on the legislative prerogative to decide how best to spend public funds.”).

229 ALLISON ET AL., *supra* note 226, at 7–8 (“Executive branch agencies that, without Congressional authorization and appropriation, pick and choose which parties receive money . . . unconstitutionally arrogate[] for themselves Congress’s exclusive power of the purse.”); cf. 2021 Clark Memorandum, *supra* note 20, at 6 (noting “how consistently those in favor of SEPs have tacitly conceded that SEPs are unlawful” and that “some defenders of SEPs frankly acknowledge[] that SEPs circumvent Congress’s power of the purse”).

230 *Stewart Transportation* had suggested early on that clever structuring might allow the government to include third-party payments in settlement agreements. See *supra* text accompanying note 40.

231 Letter from Michael Buschbacher, Boyden Gray & Assocs. PLLC, to Hon. Merrick B. Garland, Att’y Gen. of the U.S., U.S. Dep’t of Just. 10 (July 11, 2022) [hereinafter Buschbacher Letter], <https://www.regulations.gov/comment/DOJ-OAG-2022-0001-0015> [<https://perma.cc/U3Y3-W2JT>].

Act.”²³² Although the Ninth Circuit agreed that civil penalties under the Clean Water Act could “be paid only to the U.S. treasury,” it reversed because it found that the payments at issue were not civil penalties, but “simply part of an out-of-court settlement.”²³³ Relevant to the court’s analysis was the fact that the defendant admitted no liability.²³⁴ The court did not mention either the MRA or the ADA.

A few weeks later, the Third Circuit issued an opinion in its own Clean Water Act citizen suit case.²³⁵ Here, the district court had granted summary judgment to the plaintiffs and conducted a bench trial on the issue of penalties, ultimately assessing over three million dollars in civil penalties to be paid “into a trust fund to be used for improving the environment in New Jersey.”²³⁶ Although both parties appealed, neither challenged the trust fund portion of the district court’s order.²³⁷ Instead, in an ironic twist, EPA intervened to argue against this third-party payment and in favor of requiring all civil penalties to be paid to the U.S. Treasury.²³⁸ The Third Circuit agreed, holding that “Congress intended that any penalties assessed in a citizen suit be treated as ‘miscellaneous receipts.’”²³⁹ And as miscellaneous receipts, such civil penalties had to be deposited in the Treasury.²⁴⁰ Strangely, however, the court seemed to believe that the MRA’s deposit requirement was triggered only “once the court *labeled* the money as civil penalties.”²⁴¹ Ultimately the court “reverse[d] that portion of the district court’s order creating the trust fund and remand[ed] with instructions that the court order the penalties paid into the United States Treasury.”²⁴²

232 *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1352 (9th Cir. 1990).

233 *Id.* at 1354.

234 *Id.* (“No violation of the Act was found or determined by the proposed settlement judgment.”).

235 *Pub. Int. Rsch. Grp. of N.J. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990).

236 *Id.* at 68, 70.

237 *Id.* at 68, 81.

238 *Id.* at 81.

239 *Id.*

240 *Id.* (citing 31 U.S.C. § 3302(c)(1) (2018)).

241 *Id.* at 82 (emphasis added); cf. Joel Smith, *Supplemental Environmental Projects’ Wild Ride Is a Call for Legislative Action to Protect a Valuable Negotiation Tool*, 2021 J. DISP. RESOL. 369, 375 (“[C]ourts have been clear that if a payment made by a violator is labeled as a penalty then it must go to the U.S. Treasury.”). But the labeling of funds is not dispositive for determining whether they constitute a penalty. *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017) (holding that “whether a sanction represents a penalty” depends on (1) whether the offense to be redressed was committed against the public rather than an individual and (2) whether the sanction is sought for the purposes of punishment and deterrence rather than compensation).

242 *Powell Duffryn*, 913 F.2d at 82.

For those who support SEPs, these cases may seem to suggest that funds which are not categorized as penalties in a settlement agreement are immune from the MRA's requirement that public money be deposited in the Treasury. But the emphasis in both cases on penalties marks a wrong turn.²⁴³ The MRA says nothing about penalties and by its own terms applies to all "public money."²⁴⁴ The relevant question is not whether the funds to be spent on SEPs are "penalties," but whether they constitute "public money." Of this there can be little doubt. Third-party payments like SEPs involve money being spent according to the terms of a government agreement and for a public purpose, which makes the money functionally "public money" even before the government (constructively) receives it. In this sense the money is already subject to the MRA, and the *defendants* paying out the funds—no less than the third parties receiving them or the government officials negotiating for their expenditure—violate the MRA by failing, while "having custody or possession of public money," to "deposit the money without delay in the Treasury."²⁴⁵

2. *Softwood Lumber*

The defenders of SEPs rest their real hope in the 2006 OLC Opinion on the Softwood Lumber Settlement Agreement.²⁴⁶ Even when the Trump administration was implementing its policy to *prohibit* third-party payments, an accompanying OLC memo referred to *Softwood Lumber* in conceding that the new order "prohibit[ed] certain payments to third parties that this Office has concluded that the MRA *otherwise allows*."²⁴⁷ And the Biden administration cited *Softwood Lumber* when it overturned the Trump administration policy, explaining that it had "been the consistent view of the Office of Legal Counsel, including in 2020 when the Justice Department's current regulation was promulgated, that settlements involving payments to non-

243 Even so, the penalty analysis should still apply to SEPs. Under the two-part analysis in *Kokesh*, 137 S. Ct. at 1642, SEPs easily qualify as penalties because they serve to redress offenses against the public by punishing and deterring alleged violators. Thus, the MRA would require the funds at issue in SEPs to be deposited in the Treasury even under the logic adopted by the courts of appeals in these cases.

244 31 U.S.C. § 3302 (2018). In addition to the term "public money," the MRA also uses the term "money for the Government." *Id.* § 3302(b) (2018).

245 *Id.* § 3302(c)(1) (2018).

246 Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 Op. O.L.C. 111 (2006) [hereinafter *Softwood Lumber*].

247 Action Memorandum, *supra* note 136, at 2 (citing *Softwood Lumber*, *supra* note 246, at 119) (emphasis added).

governmental third parties, if properly structured, do not violate the Miscellaneous Receipts Act.”²⁴⁸

Softwood Lumber involved a settlement agreement reached between the United States and Canada to resolve “various disputes regarding trade in softwood lumber products.”²⁴⁹ OLC was asked to provide its opinion on whether “one aspect of the proposed settlement, in which duties now held by the United States would be distributed by a private foundation to ‘meritorious initiatives’ . . . would violate . . . the Miscellaneous Receipts Act” and concluded that it would not.²⁵⁰ Following previous advice, OLC said that constructive receipt of the relevant funds by the government could be avoided if

(1) the settlement [was] executed before an admission or finding of liability in favor of the United States; and (2) the United States [did] not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.²⁵¹

According to OLC, “If these two criteria are met, then the governmental control over settlement funds is so attenuated that the government cannot be said to be ‘receiving money for the Government.’”²⁵² This is not persuasive.

The first criterion is strange because settlements rarely involve an admission or finding of wrongdoing.²⁵³ But even without that, the settlement itself is predicated on the government having a *claim*. It is the claim which makes the funds involved in the settlement constitute “public money,” thus implicating the MRA through constructive receipt.

The second criterion also misses the mark: it’s not clear why the status of funds as “public money” would be established only by *post*-settlement control when the government has already exercised *pre*-settlement control in negotiating for the expenditure.²⁵⁴ Whether funds qualify as “public money” under the MRA is not a question of timing, but of structure.

But beyond the flaws in its legal argument, *Softwood Lumber* makes for an uncomfortable precedent for those seeking to justify third-party

248 2022 Memorandum, *supra* note 146, at 1 & n.2.

249 *Softwood Lumber*, *supra* note 246, at 111.

250 *Id.*

251 *Id.* at 119.

252 *Id.*

253 See Buschbacher Letter, *supra* note 231, at 9 (“There is essentially *never* an admission of wrongdoing in a settlement.”).

254 Cf. *id.* (“And who cares if there’s no post-settlement control if there’s *pre*-settlement control?”).

payments like SEPs. In OLC's view, it was "doubtful that the United States, even though having physical custody of the special accounts under the Byrd Amendment, 'could . . . accept[] possession' of those funds 'for the Government,' such that the MRA would create an issue."²⁵⁵ Indeed, there was "little basis for attributing any of the \$450 million to the United States."²⁵⁶ According to OLC the settlement agreement in *Softwood Lumber* was not just *different* from "the ordinary settlement implicating the MRA, [where] the United States has brought a claim against a private party for funds in the form of damages or penalties," but actually the "reverse."²⁵⁷ Despite the fact that the funds were in the government's custody, *Softwood Lumber* did not involve "public money" even in a *constructive* sense, so it provides an inapposite comparison for cases where the government *could* receive the funds. Ultimately the unconvincing legal reasoning in *Softwood Lumber* should be limited to its very unusual facts, and SEPs should continue to be evaluated against the more persuasive reading of the MRA going back to the 1980 OLC opinion in *Steuart Transportation*.²⁵⁸

* * *

Ultimately, no matter how persuasive these opinions purporting to offer support for SEPs might be, none of them go any further than attempting to address potential issues under the MRA. They do not address other statutory difficulties involving the ADA, let alone the deeper problems presented by constitutional structural considerations.

III. ENDING THIRD-PARTY PAYMENTS

The opposite approaches of the Trump and Biden administrations—not to mention the ease with which each side implemented its policy preferences in the *Code of Federal Regulations*—suggest that the question of SEPs and third-party payments could turn into a kind of pendulum with wild vacillations in official government policy every time a new administration comes to power. For the sake of stability and good governance, we need to agree on an enduring interpretation of this issue which can be stable across administrations. For the sake of our constitutional order, that agreement should put an end to SEPs (and third-party payments more generally) permanently. Our Constitution creates a government of three coordinate branches, and each

²⁵⁵ *Softwood Lumber*, *supra* note 246, at 120 (alterations in original) (quoting *Steuart Transportation*, *supra* note 36, at 688).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Steuart Transportation*, *supra* note 36.

of those branches offers an avenue for trying to eliminate the practice of these third-party payments.

A. *Congress: Passing the Stop Settlement Slush Funds Act*

Arguably, the U.S. Code as it currently stands already prohibits the use of all non-diesel-emissions-reduction SEPs in settlement agreements, but as with so many previous attempts by Congress to enforce by statute its constitutional prerogative to control the government purse, the executive branch remains unfazed and continues to skirt existing restrictions in favor of exercising its own control over the federal fisc.²⁵⁹ The Stop Settlement Slush Funds Act of 2017 was intended to shut down this runaround, but did not make it past the hurdle of bicameralism, let alone presentment.²⁶⁰ Congress could try again.²⁶¹ Perhaps the Senate will be more amenable to passing such a statute in the future, and maybe the President would sign such a law if it reached his desk. However, absent the development of a durable consensus among interested parties and government officials that SEPs are actually bad policy, there would always be a danger that some future Congress might reverse course and repeal this law or even pass a statute affirmatively authorizing third-party payments more broadly. Given the current state of affairs, passing a statute might win the battle, but it seems unlikely to win the war.

B. *The Executive: The Role of the Administrative Procedure Act*

The executive branch is the one negotiating the settlement agreements and thus has direct influence over what they include. Obviously, a simple change in executive policy could put an end to all third-party payments in settlement agreements overnight. But while just changing the policy is the easiest way to accomplish the goal, it is also the easiest of the available methods to undo. Creating a more durable policy requires time and effort. The Trump administration spent almost *four years* developing and implementing a comprehensive policy against third-party payments,²⁶² culminating in the adoption of a formal rule promulgated in the *Code of Federal Regulations* that prohibited their use in settlement agreements, subject only to several limited exceptions.²⁶³ Although this seemed promising at the time, because the rule was one of “internal agency practice and procedure,” the Biden administration

259 See Peterson, *supra* note 179, at 330–31.

260 H.R. 732, 115th Cong. § 2(a) (2017).

261 See, e.g., H.R. 5773, 117th Cong. (2021); S. 2079, 117th Cong. (2021); H.R. 788, 118th Cong. (2023); S. 225, 118th Cong. (2023).

262 See discussion *supra* Section I.C.

263 28 C.F.R. § 50.28 (2021); see *supra* text accompanying notes 135–39.

was able to repeal it with an interim final rule that was effective the day it was published.²⁶⁴ Perhaps a more durable elimination of third-party payments could be accomplished by following the appropriate procedures in the Administrative Procedure Act (APA) to promulgate a legislative rule subject to the usual conditions, like allowing a period for public comment.²⁶⁵ Still, what the APA giveth, the APA can take away.²⁶⁶ A motivated administration down the road could summon the energy and resources to repeal or amend the rule again.

C. *The Judiciary: Bringing a Challenge to a Consent Decree*

The most promising route to bringing about a more stable resolution to this issue is through the courts.²⁶⁷ One option would be to bring a challenge to a consent decree which includes a SEP or other third-party payment, like the Whiting refinery consent decree discussed in the Introduction to this Note.²⁶⁸ These consent decrees have to be announced publicly before the judge can enter them, and this allows a concerned party to intervene²⁶⁹ and present the arguments laid out above that SEPs (and third-party payments more generally) present insuperable statutory and constitutional problems. An opinion from a district judge laying out the argument and explaining why she cannot enter a settlement agreement containing such a provision might break the stalemate on this issue. One district judge could not end the practice for good, but a campaign of objecting to consent decrees containing SEPs might have a salutary effect, either by allowing the issue to percolate up through the courts of appeals (until it was ripe for review

264 Rule Repeal, *supra* note 25, at 27937. See Final Rule, *supra* note 83, at 97531 (explaining why arguments that revoking the 2020 Rule, *supra* note 135, was arbitrary and capricious are unavailing).

265 See Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 116 (2011) (“[A]n agency that previously administered a statutory regime through case-by-case adjudication or nonbinding guidance may issue a legislative rule that not only standardizes agency procedure, but also adopts a substantively different approach.”).

266 *Cf. Job* 1:21.

267 This route is the most promising in the sense of providing the best opportunity for effecting a permanent end to the practice of SEPs. But it must be admitted that “as of this writing, no federal court has struck down a proposed consent decree consistent with EPA or DOJ policy on the grounds that the particular agency-approved SEP, or SEPs in general, violate the MRA or the [ADA].” Alvarez et al., *supra* note 88, at 10389.

268 See Consent Decree, *supra* note 3; see also discussion *supra* Introduction. A consent decree containing a diesel emissions reduction SEP might not be the strongest vehicle for this strategy because it eliminates the statutory arguments about the MRA and ADA and requires arguing that Congress cannot explicitly authorize the executive branch to negotiate SEPs as part of a settlement agreement without violating the Constitution.

269 EPA itself has intervened in the past to object to an aspect of a consent decree. Pub. Int. Rsch. Grp. of N.J. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 81 (3d Cir. 1990).

by the Supreme Court) or by convincing even administrations friendly to third-party payments that the hassle of including them in consent decrees just isn't worth it.

CONCLUSION

There are many reasons to oppose SEPs.²⁷⁰ This Note has focused on the statutory and constitutional problems, but there are also a variety of public policy objections. One problem is that SEPs give parties the possibility of “greenwashing” their destructive environmental practices.²⁷¹ Relatedly, the effectiveness of SEPs as a deterrent is open to question given the long history of alleged violators embracing them.²⁷² Moreover, SEPs allow government actors to divert public money to third-party allies or to favored projects without much public oversight.²⁷³ Finally, SEPs raise ethical problems when the government lawyers who negotiate them give away money belonging to their client: the American public.²⁷⁴

Put simply, SEPs are bad.²⁷⁵ They are unlawful. They are inconsistent with the MRA and the ADA, and they violate the constitutional separation of powers by allowing EPA to exercise Congress's exclusive “power of the purse.” They are, if you will, appropriations by another name. But refusing to *call* them appropriations doesn't change the

270 See *Return of SEPs*, *supra* note 15, at 4:19 (“SEPs are a lawless outrage and . . . their return is inconsistent with the rule of law, undermines the integrity of the Department of Justice and EPA, and creates bad incentives.”).

271 Thomas O. McGarity, *Supplemental Environmental Projects in Complex Environmental Litigation*, 98 TEX. L. REV. 1405, 1423 (2020).

272 Cf. GM-22, *supra* note 48, at 25 (“In general, the regulated community has been very receptive to this practice. In many cases, violators have found ‘alternative payments’ to be more attractive than a traditional penalty.”); Buschbacher Letter, *supra* note 231, at 16 (“The appeal to defendants . . . is a reason to be skeptical about their use.”).

273 Cf. PLF Letter, *supra* note 180, at 9 (“How often, and to whom, the Department and executive branch agencies have diverted funds, either directly or indirectly, cannot be fully known due to a lack of transparency.”).

274 See Larkin & Smith, *supra* note 222, at 449 (“[T]he McDade Amendment subjects Justice Department lawyers to the same ethical standards governing the conduct of other lawyers in the state in which an attorney is licensed. Because no lawyer in private practice may ethically give away a client's money without the latter's express permission, Justice Department lawyers also may not do so. The Department's client is the public, and the public, through the laws discussed above, has prohibited such largesse.” (footnote omitted)); cf. FreedomWorks Comment, *supra* note 162, at 2 (“The Department of Justice represents the taxpayers when it brings a lawsuit, and any damages belong to the client—that is, the taxpayers. Imagine what would happen to a lawyer in private practice who won a judgment for his client, but directed the defendant to pay part of the judgment to a third-party ‘public interest’ group. No matter how worthy the mission of the public interest group, the lawyer would be disbarred for violating ethics rules.”).

275 See *Return of SEPs*, *supra* note 15, at 19:47.

reality that only Congress is authorized to appropriate federal funds under our system of government: as long as they're being performed by the executive branch, appropriations by any other name are just as unconstitutional.²⁷⁶

Yet despite all of these arguments having been laid out publicly, the Biden administration chose to reinstate SEPs as a tool available in the negotiation of agreements to settle government enforcement actions.²⁷⁷ Attempts to kill off SEPs through legislative or administrative action have met with limited success. The path forward to put an end to them for good is to challenge consent decrees containing them in court to get a judicial ruling acknowledging their unlawfulness.

276 As Juliet knows. See WILLIAM SHAKESPEARE, *ROMEO & JULIET* act 2, sc. 2, ll. 43–44 (John Dover Wilson & G.I. Duthie eds., 1959) (“What’s in a name? That which we call a rose / By any other name would smell as sweet.”).

277 See Buschbacher Letter, *supra* note 231, at 18 (“SEPs were always a dubious enterprise, but the unexplained and undefended resurrection of this discredited practice sets a new low for a Department whose task is to ensure equal justice under law.”).